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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS,

v.

FLORIDA EAST COAST RAILWAY COMPANY AND
SEABOARD COAST LINE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*) is reported at 322 F. Supp. 725. The "interim report" of the entire Interstate Commerce Commission (App. C, *infra*) is reported at 337 I.C.C. 183. The "final report" of the entire Commission (App. D, *infra*) is reported at 337 I.C.C. 217.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321-2325, to set aside an order of the Commission. The final order of the three-judge dis-

trict court (App. A, *infra*) was entered on February 18, 1971. An order modifying the judgment with respect to certain record keeping matters pending appeal (App. B, *infra*) was entered on April 14, 1971. The United States and the Commission filed notices of appeal (Apps. E and F, *infra*) on April 15, 1971. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc. v. Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397; *American Trucking Associations, Inc. v. United States*, 364 U.S. 1.

QUESTIONS PRESENTED

The plaintiffs¹ below were two of the railroads that participated in a nationwide rulemaking proceeding before the Commission for the determination of whether the per diem rental charged by the railroads for the use of each other's freight cars should be increased to include an incentive element. In a tentative decision (the "interim report"), the Commission invited the parties to submit their evidence in written form. The questions presented are:

1. Whether, where agency action in a lengthy, complex and continuing rulemaking proceeding has been taken only after all interested parties have been afforded a full opportunity to submit evidence and argument in written form, appellees are entitled, under Section 556 of the Administrative Procedure Act, to

¹ Seaboard Coast Line Railroad Co. ("Seaboard"), and the Florida East Coast Railway Company ("FEC").

an oral hearing before the Commission without showing that they would be prejudiced by inability to present live testimony or to cross-examine witnesses.

2. If not, whether appellees made a sufficient showing of prejudice by their general assertions that they needed an opportunity for cross-examination of witnesses and the presentation of other evidence at an oral hearing in order to obtain a fair hearing on certain issues, particularly where it is clear that the Commission would arrive at the same conclusion even if they were to establish all they sought to prove.

STATUTE INVOLVED

The proceeding before the Commission was conducted pursuant to the 1966 amendment of Section 1(14)(a) of the Interstate Commerce Act.² The amendment added the final two sentences of the three-sentence Section. The complete Section, as amended, 49 U.S.C. (Supp. V) 1(14)(a), provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or

²Public Law 89-430, 89th Cong., 80 Stat. 168.

practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. (Supp. V) 556(d), provides that in rule-making proceedings, such as under the above statute, "an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

STATEMENT

The first sentence of Section 1(14)(a), *supra*, authorizes the Commission to prescribe the ordinary compensation to be paid by one railroad to another for the use of its freight cars. Such compensation is generally fixed on the basis of a daily rate known as "basic per diem."¹ In 1966, Congress amended the statute to require that the Commission determine whether per diem compensation computed solely on the basis of elements of ownership expense should be increased by an "incentive element" to alleviate a long-standing shortage of freight cars by both improving the utilization of the available car supply and expanding the national fleet.

1. *The discontinued investigation of 1966.* Following the 1966 amendment, the Commission issued a notice of proposed rulemaking in a proceeding entitled *Incentive Per Diem Charges, Ex Parte No. 252* (31 F.R. 9240). After extensive and lengthy proceedings, in which 189 separate railroads participated, including participation by some of them in oral hearings, the Commission concluded that "[a]n overall nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types" (332 I.C.C. 11, 15). It found that "the investigation produced no reliable information

¹ See *Union Pacific R. Co. v. United States*, 300 F. Supp. 318 (D. Nebr.); *Boston and Maine Railroad v. United States*, 297 F. Supp. 615 (D. Mass.), affirmed *per curiam*, 396 U.S. 27, rehearing denied, 396 U.S. 1030.

respecting the quantum of interim incentive charge necessary to meet the statutory standards" and further concluded "that the information necessary to this decision is not presently available" (332 I.C.C. at 16). Discontinuing the rulemaking proceedings, the Commission announced its intention to remedy the existing informational deficiency through institution of a nationwide freight car investigation (*id* at 18).

2. *Freight Car Study of 1968*. In December 1967, the Commission initiated the present proceeding by requiring all common carriers subject to the Interstate Commerce Act to participate in a study of car demand and supply conditions throughout the country (App. C, *infra*, p. 53a). The railroads supplied a scientific and systematic sampling of car orders, supply and placement, during the study period, in a total of 32,420 reports that covered 2,641 stations on 135 railroads (App. C, *infra*, p. 62a). The Commission found, without serious challenge, that the study was statistically sound (App. D, *infra*, p. 89a). The accumulated data were recorded on magnetic tapes and made available to the carriers (App. G, *infra*, p. 136a).

On May 13, 1969, an initial analysis of the data was presented to the subcommittee on Surface Transportation of the Senate Committee on Commerce.* Members of the subcommittee—impatient with delays in implementing the legislative mandate to deal with the pressing problem of car shortages—emphatically ex-

* Reprinted in *Freight Car Supply*, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess.

pressed the opinion that the Commission had sufficient information upon which to act. A subsequent Commission proposal for further study of additional types of freight cars was firmly opposed, as unnecessary, by a number of carriers, including both appellees.

3. *Interim decision.* Thereafter, on December 12, 1969, the entire Commission issued an interim report, order, and rule, proposing a scale of incentive charges based on a further analysis of the 1968 data (App. C, *infra*, pp. 51a-84a).⁵ Based on the data it then had, the Commission found the existing supply of standard boxcars inadequate to satisfy car demands for at least half the calendar year (App. C, *infra*, p. 54a), and proposed an incentive per diem charge limited to unequipped boxcars on general service, that would provide, on a yearly basis, a return on investment comparable to that which could be expected by investments in nonregulated corporations (App. C, *infra*, pp. 53a-58a). It was anticipated that the proposed incentive would have the dual benefit of improving car utilization of the type in short supply during the period of greatest need, and providing a fund with which to augment the deficient national boxcar fleet (App. C, *infra*, p. 54a).

The interim report emphasized that (App. C, *infra*, p. 55a):

* * * the proposed incentive charges are both tentative and experimental. Before becoming effective, they are open to comment and criticism, including oral hearing should the circumstances warrant. After becoming effective,

⁵ The order and rule were published at 34 F. R. 20438.

they may be modified as future circumstances require. Here, as with basic per diem, we envision an open-ended proceeding, whereby studies, suggestions, and proposed changes may be submitted as the charges are tested in the light of actual experience.

The interim order invited all interested parties to submit "verified statements of fact, briefs, and statements of position respecting the tentative conclusions reached * * *, the rules and regulations proposed * * *, and any other pertinent matter * * *" (App. C, *infra*, p. 81a). It further directed "[t]hat any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced" (*ibid.*).

Numerous railroads, shippers, governmental agencies, and organizations of shippers responded to the invitation, some favoring and others opposing the tentative rules and incentive charges. Among those seeking an oral hearing were the Long Island Railroad Company and appellees Seaboard and FEC. The Long Island requested "testimony by the Commission's staff which would serve to introduce into evidence the studies relied upon in the Interim Report," and that it be given an opportunity "to cross-examine witnesses in relation thereto and to rebut same."

Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased. It complained that there had been no

* Reply Statement of the Long Island Railroad Company, p. 5; and see Long Island's motion for modification of interim order, filed March 16, 1970.

"hearing" and urged that the interim order be "set aside until a proper record can be made." It neither proffered data for the use of the Commission nor described any evidence that it wished to adduce at an oral hearing.

FEC filed a brief, and written evidence in the form of verified statements made by two of its officers. In a 2½ page request for an oral hearing,⁹ it stated that it desired to cross-examine "those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in Ex parte No. 252." It stated that it expected to establish through such cross-examination that:

a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region;

b. Railroad ownership of additional plain [standard] box cars would not necessarily change the results summarized in the appendices to the interim report;

⁹ App. A, *infra*, pp. 20a, 27a, Statement of Position of Seaboard Coast Line Railroad Company, filed March 17, 1970, attached as Appendix A to the decision below.

⁹ App. A, *infra*, pp. 46a-48a; Representations of Florida East Coast Ry. Co. and Request for Oral Hearing and Oral Argument, filed March 17, 1970, and attached in part as Appendix B to the decision below.

c. No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year;

d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

4. *Final Commission decision.* On April 28, 1970, the Commission entered its final report, order and rules (App. D, *infra*, pp. 85a-114a). With modifications not here relevant, it adopted the conclusions of the interim report and set forth additional detailed findings in response to the submissions of the parties. The Commission found that no party had been prejudiced by the submission of evidence in written form and that therefore, under Section 556 of the Administrative Procedure Act, the hearing requirement of Section 1(14)(a) of the Interstate Commerce Act had been complied with (App. D, *infra*, p. 87a). It reiterated that this was an "open-ended" proceeding in which the parties were expected to bring to its attention "any evidence of circumstances requiring modification of the rules * * * as experience is gained under the new regulations" (App. D, *infra*, pp. 87a-88a). The requests for oral hearing were denied "in the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern" (App. D, *infra*, p. 88a). The Commission stated, however, that the

requests could be renewed "as experience is obtained with the incentive charges" (*ibid.*).

The Commission denied exemptions to any groups of railroads, but emphasized again that, "following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceeding" (App. D, *infra*, p. 103a).

5. *The New York litigation.* The Long Island Railroad attacked the Commission's denial of an oral hearing in an action filed in the Eastern District of New York. *Long Island Railroad Co. v. United States*, 318 F. Supp. 490 (App. G, *infra*). The three-judge district court, in an opinion by Circuit Judge Friendly, sustained the Commission's decision. It held that under Section 556(d) of the Administrative Procedure Act the agency could properly rely upon evidence submitted in written form without an oral hearing, unless a party would thereby be "prejudiced" (App. G, *infra*, pp. 134a-137a). Long Island's request for an oral hearing failed to notify the Commission of possible prejudice because it did not specify the need for cross examination or presentation of live rebuttal testimony (App. G, *infra*, pp. 136a-137a).

Considering specific representations of prejudice made to it but not to the Commission, the court concluded that it was not shown "how cross-examination with respect to the statistics or the presentation of oral rather than written testimony would have aided

materially in their resolution" (App. G, *infra*, p. 14, emphasis supplied). The court emphasized that "the decision here called for a leap of judgment by the Commission which detailed figures would inform but could not determine" (*ibid.*).

6. *The instant litigation.* Seaboard and FEC attacked the Commission's decision in separate suits, which were heard together by a three-judge court for the Middle District of Florida. Without reaching the merits of the per diem order, the district court reversed and remanded on the ground that Seaboard and FEC had not been given an oral hearing (App. A, *infra*, pp. 1a-16a). In ruling that it was not enough that the two railroads had been given an opportunity to present their own analyses of the 1968 data or any other pertinent evidence they desired in written form, the court distinguished the *Long Island* case on factual grounds (App. A, *infra*, pp. 7a-8a); the court concluded, without substantial analysis, that "assertions" made by Seaboard and FEC to the Commission "demonstrate the prejudice" of denying them an oral hearing (App. A, *infra*, p. 8a).

The district court found the Commission's argument that the evidence to be adduced must be capable of materially affecting its decision "wide of the mark" (*ibid.*); it insisted that the Commission give "strict adherence to cherished procedural rights" in the form of oral hearings (*ibid.*). The court found its conclusion "fortified" by statements of the Commission's former General Counsel before the Senate subcommittee that

"hearings" were necessary in order to impose incentive per diem charges (App. A, *infra*, p. 16a).

THE QUESTIONS ARE SUBSTANTIAL

1. In amending Section 1(14) (a) in 1966 to provide for per diem incentive charges, Congress was reacting to severe boxcar shortages throughout the nation. The Senate Committee on Commerce had reported that:

Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe, and nationwide in scope as the national freight car supply has plummeted * * * *

The immediate effect of the court's order is to exempt Seaboard and FEC from the operation of the incentive rules and charges imposed by the Commission in its first order under the new statute.¹⁰ Seaboard is one of the nation's largest railroads.¹¹ FEC, although a much smaller railroad, terminates thou-

¹⁰ S. Rep. No. 386, 89th Cong., 1st Sess., pp. 1-2; see also H. Rep. No. 1183, 89th Cong., 1st Sess.

¹¹ The order has become effective with respect to all carriers other than Seaboard and FEC, neither of whom have paid or received incentive per diem since the promulgation of the Commission's order as a result of a temporary restraining order entered by the district court. That order, as continued by further order following entry of the court's judgment (App. B, *infra*, p. 49a), requires both carriers to maintain records adequate for reimbursing creditor lines should the judgment be reversed on appeal.

¹² Seaboard was formed by the merger of more than 9,700 miles of railroad throughout the Southeastern portion of the country under the decision of the Commission in *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 122.

sands of boxcars each year in Florida and has frequently been the subject of Commission orders requiring it to deliver boxcars, remaining on its lines in excess of its own requirements, to carriers in need of cars.¹³

But beyond this immediate impact, the decision below threatens to disrupt the entire national plan before it has been given a fair trial. The great majority of the nation's railroads have not attacked the new charges. If the decision below is permitted to stand, however, other railroads will be encouraged either to seek a broader reopening of the proceeding or to bring lawsuits to set aside the Commission's order. At least one other major railroad has threatened such litigation. The rules and charges here in issue are so central to the alleviation of the freight car shortage that the validity of the Commission's decision and of its procedures should not be left uncertain.

2. The decision of the Florida court is in basic conflict with the decision of the New York court in *Long Island Railroad Co., supra*. This Court should resolve the conflict for the guidance of the Commission and other agencies governed by the Administrative Procedure Act.

The New York court correctly read Section 556(d) of the Administrative Procedure Act to require an oral hearing only if shown to be needed to enable a

¹³ Several "car distribution directions" against FEC entered by the staff of the Commission in 1969 and 1970 were made a part of the record in the district court at the hearing on the motion for temporary restraining order.

party fairly to present its case (App. G, *infra*, pp. 134a-137a). Assessing the Long Island's post-Commission decision specification of prejudice, the court found that the matters raised had already been dealt with extensively by the Commission and that an oral hearing was not required. Underlying the court's decision was its recognition that the Commission had acted to deal with an urgent matter of national concern based on its own analysis of data that was freely available to the railroads and on which they had commented extensively in writing (see App. G, *infra*, pp. 135a-136a).

In sharp contrast, the court below made no inquiry into whether Seaboard or FEC had shown a need for cross-examination or the presentation of live testimony¹³ and also failed to assess the likely impact that the matters allegedly requiring an oral hearing would have had upon the Commission's conclusions. Instead of such analysis, it merely admonished the Commission to give "strict adherence to cherished procedural rights" (App. A, *infra*, p. 8a). An examination of the matters raised by appellees, however, shows that it is extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order. Seaboard's statement of position before the Commission did not even generally describe the specific evidence to be adduced at an oral hearing.

¹³ The court's opinion seems to ignore the fact that the carriers were permitted to present written evidence, and states only that they were permitted to file "statements of position" (App. A, *infra*, p. 5a).

And the questions FEC sought to have answered through cross-examination of Commission staff were so worded that the Commission would readily have agreed with each "fact" sought to be adduced without changing any of its conclusions.¹⁴ Moreover, the issues in dispute raised policy rather than factual questions and were adequately considered by the Commission.¹⁵

We believe that before any party to a broad rule-making proceeding can show that "prejudice" within the meaning of 5 U.S.C. 556(d) will result from restricting the submission of evidence to written form, it must show with some specificity what either cross-examination of witnesses or live testimony can add to the record and that the addition could materially affect the agency decision. This principle is squarely supported by the New York decision, but cast in con-

¹⁴ For example, FEC sought to prove that the failure to fill orders "may" not be affected by car supply; that ownership of more cars "would not necessarily" improve the car shortage; that the number of additional cars needed to furnish "all" cars on the day ordered is not known; and it is unreasonable to expect railroads to supply cars for loading within 24 hours in "all" instances. See pp. 9-10, *supra*.

¹⁵ Seaboard's principal objection before the Commission was that the application of incentives solely to standard boxcars unfairly penalized Seaboard for heavy purchases of specially equipped cars to meet the peculiar needs of its shippers (App. A, *infra*, pp. 21a-25a). FEC's main contention was that it should be excluded from the burdens of the incentives because of its status as a terminating line (App. A, *infra*, 34a-39a). Both are fundamental policy questions that were fully considered by the Commission, subject to the continuing nature of this proceeding (App. D, *infra*, pp. 91a-92a (limitations of incentives to unequipped boxcars); pp. 99a-101a (no exemption for terminating lines)).

siderable doubt by the decision here on appeal. If the court below is correct, then significant new avenues of delay are available to adversaries in rulemaking proceedings before administrative agencies. If a party can require an agency to convene an oral hearing by a bare assertion that it desires to cross-examine witnesses, administrative rulemaking could become bogged down in almost endless hearings.¹⁸ Cross-examination is, of course, not available to witnesses in legislative hearings, to which administrative rulemaking hearings are closely analogous, and Congress has wisely refrained from engrafting a routine right of cross-examination on those "quasi-legislative" administrative proceedings.

This Court has never definitively interpreted the term "prejudice" in 5 U.S.C. 556(d). Consequently, this appeal raises questions, affecting numerous agencies of the federal government, which in one sense are questions of first impression. The decision of the court below, however, is contrary to many statements of this Court which have indicated that it will

¹⁸ The district court, in our view, misinterpreted the remarks of the Commission's former General Counsel, Mr. Robert W. Ginnane, before the Senate Subcommittee. Mr. Ginnane was distinguishing Section 1(14)(a) from the emergency powers conferred upon the Commission under Section 1(15), which may be exercised without a hearing. He did not attempt to define the type of hearing required under Section 1(14)(a), nor did he address himself to whether written testimony could satisfy the statutory "hearing" requirement. He stated only that it was necessary for the Commission to give "an opportunity for a hearing", a formulation fully consistent with the Commission's present position. (App. A, *infra*, p. 14a.)

"never presume that Congress intended an agency to waste time on applications that do not state a valid basis for a hearing.' " 17

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1971.

¹⁷ *Denver Stock Yard v. Livestock Assn.*, 356 U.S. 282, 287, quoting from *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205. See, also, *Yakus v. United States*, 321 U.S. 414, 436; *Lincoln Transit Co. v. United States*, 256 F. Supp. 990, 994 (S.D.N.Y.).

APPENDIX A

United States District Court Middle District of
Florida Jacksonville Division

No. 70-574-Civ-J

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION,
FLORIDA EAST COAST BUILDING, ST. AUGUSTINE,
FLORIDA, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS.

No. 70-577-Civ-J

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS.

Before SIMPSON, Circuit Judge, and McRAE and
SCOTT, District Judges

SIMPSON, Circuit Judge. These are actions under Title 28, U.S.C., Sections 1336, 1398, 2284 and 2321-25, to set aside the incentive per diem rates established by the Interstate Commerce Commission (Commission) in its rulemaking proceeding entitled *Incentive Per Diem Charges—1968*.¹ In this proceeding the Commission issued two formal reports comprising its decision,

¹ Ex Parte No. 252 (Sub-No. 1).

the interim report of December 12, 1969^{*} and the final report of April 28, 1970.^{*}

On August 28, 1970, Judge McRae for this three-judge court entered two orders restraining the operation of the Commission orders but only insofar as they affected the two plaintiffs before the court. The temporary restraining orders were amended by order of August 31, 1970, to prevent the plaintiffs from benefiting from the rules and charges during the period they were not required to pay incentives by requiring them to keep records in order to make restitution to other railroads if so ordered by final decision of this court.

The dispute arose against the following background. For a number of years portions of the nation have been plagued with seasonal shortages of freight cars in which to ship goods. The incentive per diems are an attempt by the Commission to alleviate this problem at least in part.

The Commission was first given the power in 1917 to regulate car service and the compensation paid by railroads for the use of cars not owned by the railroad utilizing the car. The current statutory authority for such regulation is embodied in Section 1(14)(a) (49 U.S.C. 1(14)(a)) of the Interstate Commerce Act:

§ 1, par. (14). Establishment by Commission of rules, etc., as to car service. (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement or arrangement for the use of any locomotive, car, or

^{*} 337 I.C.C. 183.

^{*} 337 I.C.C. 217.

other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices.

The Commission also was given the power to meet emergency situations by summary measures without notice or hearing. Title 49, U.S.C., Sec. 1(15). Considering these powers insufficient to meet the continuing crisis in the railroad industry, Congress in 1966 added the following language to Section 1(14)(a) to give the Commission wider discretion in dealing with rail car shortages:

In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the

Commission finds it to be in the national interest.

Thereafter the Commission began an investigation, *Ex Parte No. 252, Incentive Per Diem Charges*, to determine the appropriateness of the establishment of an increased incentive. 332 I.C.C. 11, 12 (1967). In October 1967, the Commission concluded that the information it had accumulated was insufficient to draw any conclusions therefrom, and discontinued the proceeding. In December 1967, the Commission initiated a rulemaking procedure requiring the Class I and II railroads to gather and report to the Commission detailed information concerning freight car supply and demand for a specified period. It is clear that at that time further hearings were contemplated prior to the enactment of any new rules. The information submitted by the railroads was analyzed and presented to Congress by the Commission in a "Report of the Results of Freight Car Study in Ex Parte No. 252 (Sub No. 1)". Members of the Senate Subcommittee on Surface Transportation expressed considerable dissatisfaction with the Commission's apparent inability to take effective steps toward eliminating the national shortage of freight cars. Comments were general that the Commission was conducting too many hearings and taking too little action. Senators pressed for more action and less talk, but Commission counsel expressed doubt respecting the Commission's statutory power to act without additional hearings. Despite Commission counsel's expressed misgivings about straightaway action, the Commission in December 1969 published an Interim Report announcing its tentative conclusions to adopt incentive per diem charges on standard boxcars based on the information compiled by the railroads to be in effect from September 1 to the end of February of each year. Attached to the Report was

a proposed rule adopting the Commission's tentative conclusion. The railroads were requested to make statements of position and were informed "that any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced". Seaboard Coast Line (Seaboard) and Florida East Coast (FEC) requested oral hearings, as did numerous other railroads. In April 1970, however, the Commission entered its order without holding further hearings, finding that the procedure did not prejudice the parties and that further hearings could be held as experience under the incentive plan dictated. These suits followed.

Seaboard, in its attack upon the actions of the Commission, alleges (1) that the Commission failed to afford it a proper hearing and that such failure prejudiced Seaboard, (2) that the Commission failed to comply with the requirements of Section 1(14)(a) of the Act, and (3) that the Report and order of the Commission does not contain reasons and findings sufficient to support the Commission's conclusions. FEC joins in Seaboard's arguments that it was improper for the Commission to act without further hearings and that the Commission's conclusions are not based on substantial evidence, and also adds the contentions that (1) the Commission's order is so unreasonable as to deny due process and (2) that the Commission should have exempted FEC from incentive per diem payments. Since we find that the Commission acted illegally in denying the plaintiff railroads a hearing before the imposition of the incentive per diem charges, we pretermit discussion of all but the first point.

The parties agree that what is at issue is the question of what degree of procedural due process accompanies a Commission rulemaking proceeding. Section

1(14)(a) of the Interstate Commerce Act clearly states that the Commission may establish reasonable rules, regulations, and practices with regard to the subjects described therein *after hearing*. Section 1(14)(a), however, is modified by provisions of the Administrative Procedure Act (APA), Title 5, U.S.C., § 551 et seq. Section 553(c) provides "When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection". The pertinent section to the problem at hand, Section 556(d), provides:

(d) Except as otherwise provided by statute the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. *In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.* (Emphasis added)

The Commission argues that the emphasized portion of the statute allows the procedure utilized by the Commission in this instance, relying primarily upon the able opinion of Judge Friendly for the

statutory three-judge district court in *Long Island Railroad Company v. United States*, 318 F. Supp. 490 (E.D.N.Y., July 22, 1970) involving the same Commission April 1970 order. In *Long Island* the court concluded that the plaintiff railroad had shown no prejudice from the procedures utilized by the Commission, noting that "Long Island's request for an oral hearing was silent as to any request in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal". 318 F. Supp. at 499. However, that court expressly limited its holding by warning "If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case". Op. cit. at 499.

We think that the facts of the instant case fall within the exception expressed in *Long Island*, and demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission. For instance, the Seaboard noted in its statement of position its recent acquisition of large numbers of specialty cars in reliance on the well-established Commission principle that a railroad's primary duty is to provide effective service to the shippers in its area, and pointed out that the sudden emphasis by the Commission on unequipped boxcars to the exclusion of other cars would punish the Seaboard for its reliance. Seaboard questioned the foundation for the board's order, labeling it an experiment the results of which the Commission was unable to predict. Seaboard also contested the "earmarking" aspect of the funds received by each railroad from the operation of the incentive per diems. It observed that the hasty action

of the Commission—decided upon without hearings and with conclusions so admittedly tentative as to give validity to the label “experiment”—would cost Seaboard approximately 1.8 million dollars annually. FEC presents an even stronger case for a hearing. FEC details its status as a terminating line and the asserted strong policy reasons for exemption of FEC from the incentive per diem charges. FEC sought to disclose a number of deficiencies in the Commission's order by presentation of evidence and cross-examination of the employees of the Commission who directed and prepared the studies relied upon in reaching the Commission conclusions. The statements of Seaboard and FEC are attached hereto as Appendix A and B, respectively. Without discussing in detail the grounds there urged as requiring a hearing, we are of the clear view that these assertions demonstrate the prejudice to Seaboard and FEC arising from the Commission's failure to provide hearings.

The Commission contends that even if the plaintiffs prove all that they seek opportunity to prove, the Commission's order can still be sustained. That argument is wide of the mark. Statutory and constitutional procedural due process does not direct itself to the question of what decision should be reached in any given case, but rather deals with the process of decision making. Numerous decisions made on insufficient records are eventually sustained after being supplemented by further hearings, but that does not negate the right of the parties to be heard. Anyone can make decisions, but strict adherence to cherished procedural rights is necessary to insure that the decisions are informed.

Excerpts from the testimony of the Commission Chairman, Mrs. Brown, in the hearings before the Senate Subcommittee on Surface Transportation of

the Committee on Commerce, held May 13, 1969, Serial No. 91-8, and the accompanying statements of Mr. Ginnane, Commission counsel, forecast this litigation and offer insight into the reasons for the actions of the Commission:

Senator HARTKE. All right. Let me come straight to the question that I think is paramount. That is the question of legal interpretation of the act itself and the amendments. It is my understanding that the Commission and its legal authorities have taken the position that before any type of basic action can be taken, before any preventive measures can be taken, it must be shown that there is an actual shortage which is determined in accordance with a hearing.

In other words, that you have to establish a shortage by competent testimony and study before you can act even though it is arguable that preventive hearings are not required by the act.

Now, I would like to have a statement as to whether or not I correctly interpreted what the Commission's interpretation of the law is?

Mrs. BROWN. I believe you said preventive actions?

Senator HARTKE. Yes.

Mrs. BROWN. As we have stated, in the statement itself, that a hearing is necessary and I am going to refer the technical legal question to our general counsel, Robert Ginnane, who is seated at the end of the table.

Mr. GINNANE. In answer to your question, Senator, I don't want to be too dogmatic.

Senator HARTKE. Lawyers never are, don't worry about that. I am a lawyer myself.

Mr. GINNANE. For this practical reason, I don't know what ultimate action of the Commission I may be defending in the Court and I don't want to say it in words that may be thrown in my face.

The CHAIRMAN.* Say that again. I didn't hear you.

Mr. GINNANE. I don't want to make a statement here that can be thrown in my face in any later court proceedings.

The CHAIRMAN. You mean about box car shortages?

Mr. GINNANE. In terms of the defending—

The CHAIRMAN. Excuse me, I don't want to interrupt, but I don't understand your comment.

Mr. GINNANE. I mean in terms of defending any order which the Commission might issue. But I can answer your question to this extent—

The CHAIRMAN. If you were in the court whose side would you be on?

Mr. GINNANE. Defending whatever order the Commission issues.

Senator HARTKE. Well, I do not think that you have any more responsibility to the Commission than you have to the Congress of the United States. You do not have a responsibility which is more supreme than that owed to the Congress.

After all, the Commission is an arm of the Congress and this is a hearing in front of the Congress. We are not just up here representing our own personal viewpoint.

You are an arm of the Congress. In my opinion, and I say this and don't insist upon it, in my opinion it is your responsibility to give an interpretation of the Act as you understand it and let the chips fall where they may after that.

If the Commission decides to overrule you they had better get a new counsel.

Mr. GINNANE. I think I can be helpful in this way, Senator: As Chairman Brown pointed out, the Commission can fix per diem.

* Senator Magnuson, Chairman of the Senate Committee on Commerce.

Senator HARTKE. That is interpretation; is that right?

Mr. GINNANE. Yes; there must be a hearing. That is in the beginning of section 1(14)4, the Commission may, after hearing, on a complaint or upon its own initiative.

Senator HARTKE. That is the Commission may, after hearing on a complaint, or upon its own initiative without complaint.

Mr. GINNANE. But in either event only after a hearing.

Senator HARTKE. Why?

Mr. GINNANE. Because the Congress has so reported it in the opening clause of section 1 (14). The Commission may after a hearing.

Senator HARTKE. If you go back to the amendment itself which was enacted in 1966, this amendment was put in there specifically for the purpose of eliminating the very problem that we had. Tell me in that section where you conclude that you must have a hearing, especially in view of your emergency powers under section 1, subsection 15.

Mr. GINNANE. I have to call your attention to the fact that in the emergency powers of section 1, paragraph 15, we can act summarily and without a hearing on every element except the element of compensation to be paid for the use of cars.

That 1(15) goes on to provide that the compensation will be for the use of cars resultant from our exercising powers. If the carriers cannot agree on that compensation, it must be fixed by the Commission after a hearing.

* * * * *

Mr. GINNANE. Even under 1(15) we can't fix rates of compensation without a hearing.

Senator HARTKE. Do you have trouble having a hearing, I mean since 1966? One of the reasons I set the hearing for this date was that I wanted to preclude your coming in with another delay. I wasn't going to wait any longer.

What I am asking you is why didn't you have the hearing? What is there to prevent you, you have this material. Is there any reason? I think that the people who are involved here—you have the shippers, the carriers, and the public all lose money and the report that you have here, which is filed today and I am glad you have it here, indicates that it is a rather substantial loss.

These are losses not alone to those people involved but to the total Nation's economy.

Mrs. BROWN. Well, I can simply say, as you know, the study has been presented to you in the form that it is now and——

Senator HARTKE. And it has one of those little hookers on the end of it that the railroads are now going to claim that they want an advisory commission that you are going to come in and recommend an advisory commission and we are going to have this S of S syndrome right back in our face again.

If you raise the basic per diem to \$4.50 or \$5, would not these cars find their way home very fast? Wagging their tail behind them?

Mrs. BROWN. Well, that precisely, I don't know about the amount, but that precisely is the position that the Commission is trying to get itself in which our lawyers have told us there must be a hearing on and at the outside date would be within 3 or 4 months.

It could be even closer than that. In order to have the proper record.

The CHAIRMAN. Why do you say there must be a hearing? You have authority, unless I am wrong when I wrote the act, to act on your own initiative without a hearing. I mean it is advisable if you can have a hearing, I understand that, or am I wrong?

Mrs. BROWN. Well, I am going to defer to my general counsel again because I am told that you have to have a hearing.

The CHAIRMAN. You can issue an emergency order at any time without a hearing. If the

act doesn't allow that we are going to change it, I will tell you that. What is the use of having a hearing on these things? I just don't understand. I don't understand what you are doing here. What is this exhibit appendix D? Can anybody understand that?

If C is greater than 1.96, the chances are 95 out of 100 that the differences is significant.

If C is greater than 2.58, the chances are 99 out of 100 that the difference is significant. The difference is ratio 1 minus ratio 2. Compute the standard area of the difference and when 2 over 1 is squared with the sampling error, the square of the sampling error is the second ratio and you compute the difference between C and D.

Now, what has that to do with boxcar service?

Mrs. BROWN. I am going to defer this question to Mr. Bybee, who heads the staff.

The CHAIRMAN. I don't think anybody can understand this thing. I thought the income tax form was bad enough, but this is something else. In other words, let's get down to some basic facts here.

We have been going at this thing how many years? Long before any of you were ever down at the ICC. I hate to repeat this but I am sure that your Chairman will allow me to, the very first meeting of the Commerce Committee I went to 25 years ago, we were discussing boxcar shortages. Twenty-five years ago.

Here we are again with studies C over D and X over C. Now, we know we are going to have a boxcar shortage in the fall.

Isn't there someone of us that can do something about it and if you haven't got enough authority under the law, we will change it for you. You can hold hearings until doomsday on these things. I suspect that we have a storeroom full of hearings on boxcar shortages. We have to move them out to Virginia, to a fieldhouse

out there because we can't handle them here, the building isn't big enough.

Now the Department of Transportation is going to study it. In other words, why study boxcar shortages, you have a shortage. You are going to have one with this year's crop. A big one.

What can we do about it, have another study? This, I don't understand.

I will ask a simple question, you can act without a hearing, am I wrong?

Mr. GINNANE. In my opinion the Commission cannot fix compensation without an opportunity for a hearing.

Senator HARTKE. How would you change this to do what the Chairman wants to do? In other words, he says you can operate without a hearing, what would we have to change?

Mr. GINNANE. To make it clear that you intended us to fix rates for the compensation without a hearing.

The CHAIRMAN. That is under emergency matters. I think that is pretty clear, you said you could act on your own initiative.

Mr. GINNANE. As I read it, sir, the Commission may, after a hearing on a complaint or on its own initiative, but after a hearing.

The CHAIRMAN. And the purpose of the law was that you could act on it. You can't have feelings on these things, the wheat in Wyoming will be lying on the ground when you start to hold hearings on it. Well, maybe we better amend the law for you to make it clear. Do you want the committee to give you an expression of intent? We can do that pretty fast.

Senator HARTKE. I can give you my expression of intent right now.

The CHAIRMAN. We want to clear up the freight car shortage. I have been in this 25 years and we haven't done it. Now you come up with some gobbledygook like this. I don't understand it. It is the duty of you people down

there to come up with some answers. What can we do?

Senator HARTKE. This is why people are getting mad at bureaucrats, if you want to know the truth. I am not against bureaucrats, I just don't like the way they act sometimes. Let's review that, Mr. Counsel.

This is section 1(15). Whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergencies requiring needed action exist in any section of the country, the Commission shall have and it is hereby given authority either upon complaint or on its own initiative without complaint, at once, if it so orders, without answer or formal proceeding by the interested carrier or carriers or without notice hearing order the making or filing of a report according to, as the Commission may determine, (a) to suspend the operation of all rules, regulations, or practices established for car service until such time determined by the Commission, (b) to make such just and reasonable corrections with respect to car service without regard to the ownership during which such emergency will best promote the interest of the public and the commerce of the people, upon such terms of compensation as the carriers may agree upon or in the event of their disagreement, the Commission may after subsequent hearing find to be just and reasonable.

That is where you hang your hat, upon that portion, is that right?

Mr. GINNANE. That's correct. We can act in terms of controlling the distribution and the use of cause without hearing.

Without question, if the actions of the Commission were in accord with legal and constitutional safe-

guards the mere fact that Commission counsel initially thought hearings necessary would be irrelevant. Nevertheless our conclusion, reached from an independent study of the record, is fortified by the fact that Commission counsel is clearly on the record before Congress as advising that hearings comprised a necessary step in the promulgation of the rules in issue here today. Counsel correctly prophesied the shape of these proceedings.

The unfortunate aspect of our ruling is that action on rail car shortages, assuming they exist (as we do), are now further delayed to allow additional hearings to be conducted. This result often ensues when administrative agencies, whether from Senatorial pressure or from other cause, attempt procedural shortcuts in decisionmaking. The shortcut frequently turns out to be the longest way home.

It is ORDERED in accordance with the foregoing that the order of the Interstate Commerce Commission dated April 28, 1970, and styled *Ex Parte No. 252 (Sub-No. 1), Incentive Per Diem Charges—1968*, is enjoined, annulled and set aside insofar as the same affects the plaintiff railroads in these proceedings and the enforcement of the Commission order is as to said plaintiffs enjoined, annulled and set aside, all without prejudice to further proceedings before and further findings and orders by the Commission not inconsistent with this opinion-order.

DONE and ORDERED at Jacksonville, Florida, this 18th day of February, 1971.

BRYAN SIMPSON

United States Circuit Judge.

WM. A. McRAE, Jr.

United States District Judge.

CHARLES R. SCOTT

United States District Judge.

**APPENDIX A TO DISTRICT COURT OPINION BEFORE THE
INTERSTATE COMMERCE COMMISSION**

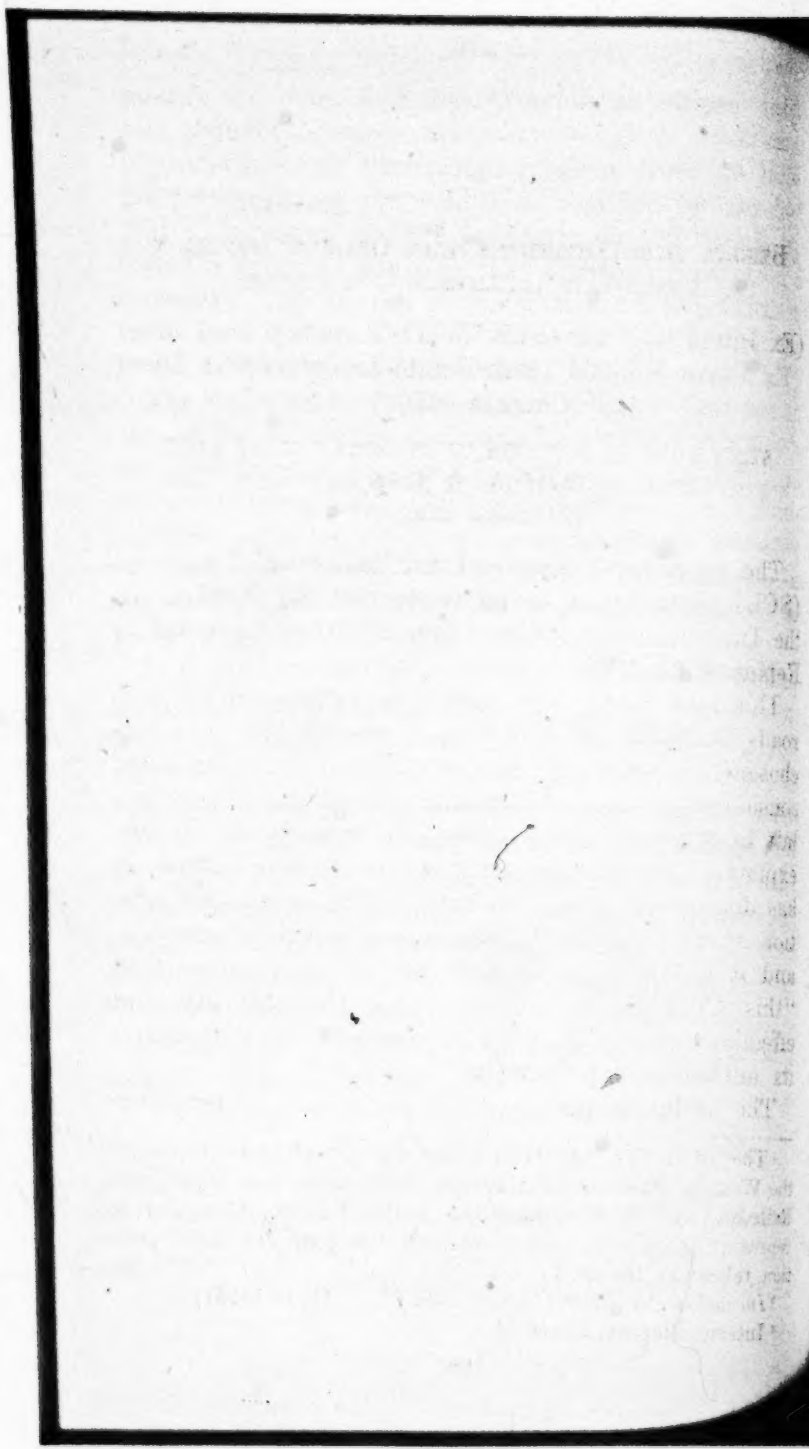
**(Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem
Charges—1969)**

**STATEMENT OF POSITION OF SEABOARD COAST LINE
RAILROAD COMPANY**

RICHARD A. HOLLANDER,
*Attorney for Seaboard
Coast Line Railroad Company.*

MARCH 17, 1970.

(17a)



BEFORE THE INTERSTATE COMMERCE COMMISSION

(Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem
Charges—1969)

STATEMENT OF POSITION OF SEABOARD COAST LINE
RAILROAD COMPANY

The Seaboard Coast Line Railroad Company (SCL) opposes the tentative conclusions reached by the Interstate Commerce Commission in its Interim Report served December 22, 1969.¹

This proceeding is of great importance to all railroads including the SCL, yet the Commission has chosen to approach it hastily, without the usual care, consideration and explanation. In doing so, it has left unanswered many questions, and it has left unexplained the reasons for many of its conclusions. It has done these things in spite of its earlier recognition of the probable severe impact of the proceeding, and it has done so in the face of its promise that "this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously."

The "solution proposed" was given to us less than

¹The SCL also has been asked by the Georgia Railroad, the Western Railway of Alabama, the Atlanta and West Point Railroad, and the Chattahoochee Valley Railway Company to represent them here and to express for them the same position taken by the SCL.

²*Incentive Per Diem Charges*, 332 I.C.C. 11, 17 (1967).

³Interim Report, Sheet 14.

than three months ago, without hearing, and, since then, the SCL has been diligently conducting its own studies for the purposes of understanding the reasons for the conclusions reached and of measuring the impact of the proposal on its operations. Those studies still are underway, but the due date for statements now is here. The SCL sought more time to measure the new plan, but that opportunity has been denied. Therefore, we are here, before the Commission, without a real chance to present detailed verified statements. That is one of our objections.

There are others. Our studies have progressed far enough to indicate major flaws in the Commission's proposition.

It has become clear, as we look into the Commission's plan, that some of the more progressive roads in the area of car supply, including the SCL, will be penalized for their proficiency. The reason for this conclusion is the fact that the tentative charges are applicable only to standard box cars. They don't apply to specially equipped box cars, and this railroad, being one of the leaders in tailoring its cars to the needs of the shipping public, now must suffer because it does not own more of the less-desirable plain boxes. Stated succinctly, when the latter type of equipment is on the lines of the SCL, it pays; when the SCL's special, expensive, more-modern box cars are on foreign lines, the SCL does not receive incentive payments. This one-way street approach places a premium on antiquity. Furthermore, it fails to heed the admonition of Section 1(14)(a) of the Interstate Commerce Act that all relevant car supply factors are to be considered.

Assuming, for the moment, that the Commission changes its tentative proposal to cover all types of box cars, or, assuming that a given carrier is a creditor line insofar as plain box cars are concerned, there appears

another disturbing feature in the report served last December 22. It relates to "Earmarking of Funds." First of all, the funds are to be tied up until "the carrier has in the same calendar year already built or purchased [or rebuilt] its 1964-1968 average number of such boxcars." Aside from the tying up of funds, what will happen to the dollars if the average is not reached in a given calendar year? Then, and perhaps most important, what possible data does the Commission possess to warrant a conclusion that the earmarked funds should be used to acquire "unequipped boxcars" when experience indicates that shipper needs are ever shifting towards specialized box cars?

This leads the SCL to a most vital objection. Obviously, it, and certain other railroads, are being forced by the Commission into a mold which has been cast to fit carriers with dissimilar transportation requirements. It has become clear from a study of the Interim Report that it was written with a limited type of railroad and certain shippers in mind. It should not have been, for the mandate of Section 1(14)(a) of the Act is ignored, and the section has been used only as a crutch to prop up limited interests. The incentive charges were not drafted to fit the "national level of ownership." We know that grain shippers have problems, and that, at times, great pressure is put on the Commission to find some way to get them additional unequipped box cars. But, the shipper and carrier interests in the part of the country which the Commission refers to as Zone 3 face in a different direction. As a result, the SCL, confronted by its users with the desire for specialty box cars, now would be required to ignore many of the needs of the Southeast. Prior to this Interim Report the Commission had told us just the opposite; that each railroad should

*Interim Report, Sheets 11-12; page 3 of appendix to order.

so acquire equipment as to protect traffic originating on its own line.

Several years ago, on April 26, 1962, in Philadelphia, Commissioner Murphy, noting that a shipper should not be made to "fit his products into a few basic types of cars, such as box, gondola, and flat cars," quite properly recognized the need for "cars to meet shippers' specialized needs," and he remarked that "(r)ailroads are realizing the possibilities inherent in specialized equipment for affording more attractive service to shippers." Then, just last year the Commission expressed its thoughts.* Speaking of the equipment demands of shippers, Division 3 said:

"The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying."

It went on to say:

"One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines, is apparently being ignored. Such

* *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 284, 286, 287 and 290.

a situation we find to be unconscionable and one that must not be continued."

When then-Chairman Webb testified before the Senate's Committee on Commerce on April 7, 1965, with respect to the enactment of Section 1(14)(a), he pointed out that "each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in numbers to protect the loadings it originates."

Until the service of the Interim Report last December 22, the SCL had every reason to believe that it could rely upon past Commission-stated objectives and upon its own business requirements with respect to car types. It still believes so, and it should not be forced by the Interim Report into the purchase of standard box cars when its business requirements make the acquisition of other kinds of equipment more desirable.

If we, on the SCL, are going to be asked to disregard our own rail users, at the very least we should know why the Commission has reached that conclusion. And, we don't know. Discussions in the Interim Report with respect to Zone 3 carriers are noticeably missing. This failure to give reasons for the limited applicability of the incentive per diem requirements, without a reasonable opportunity to be heard, does not comport with the requisites of law.

On March 27, 1969, Chairman Stafford, speaking in Minneapolis, said that Section 1(14)(a) "does not automatically place the Commission in a position to prescribe the increased per diem incentives," but that, instead:

"The statute requires a full hearing for determining whether incentive per diem should be imposed."

When he testified in 1965 before the Senate's Committee on Commerce regarding Section 1(14)(a), then-Chairman Webb said the same thing, noting, in addition, that "no sudden change in per diem charges would be effected by the proposed legislation." We believe that the "tentative approach"* used by the Commission is too superficial, and that approach, alone shows why all of the affected parties should be heard.

Without a hearing, and without an adequate discussion of reasons behind basic conclusions, the affected parties run risks such as this. In its Interim Report the Commission expressed a desire to "produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars."† The SCL has been diligent in acquiring equipment to meet the needs of its shippers, and can be said to be a creditor road, yet the new tentative order will penalize the SCL and will not send to it any "flow of funds." Instead, the SCL's tentative studies show that it will lose in excess of \$1.5 million each year as a result of the Commission's "experiment," to the detriment of its car supply program.

Further, with regard to the quotation in the previous paragraph, had there been a hearing in this matter, the parties would, no doubt, have brought attention to this statement of Commissioner Webb before the Senate Committee in 1965:

It should be emphasized that large net per diem debits do not necessarily indicate that the debtors are deficient in car ownership. Some railroads which supply great numbers of cars to the interchange fleet are not per diem debtors. Other railroads terminate so much more

* Interim Report, Sheet 6.

† Interim Report, Sheet 5.

traffic than they originate that they would be substantial net per diem debtors, even if they owned more cars than they needed. Conversely, it is conceivable that railroads which consistently show net per diem credits may not own enough freight cars of a particular type. Accordingly, if the proposed legislation were approved, the Commission would exercise *extreme caution* in setting incentive per diem rates. We recognize that an indiscriminate increase in the number of freight cars would result in an uneconomic surplus of cars of various types and would result in wasteful transportation practices.

It is open to serious question whether the Commission's plan for producing "a steady * * * flow of funds to creditor per diem roads" for the purpose of acquiring plain box cars will result in a car supply adequate to meet the needs of commerce. Rather, we think that "extreme caution" should have been utilized here so that the needs of all shippers and all carriers could have been given the necessary consideration.

And the shippers, whose cries have caused such haste here, must play a part in the hearings before more judicious conclusions are reached. For, in considering incentives, what thought has the Commission given to the shipper or consignee whose failure to promptly load, unload, or release cars is a major cause of car supply problem.

There are other problems with the Interim Report to be considered. We point out that there is great danger in engaging in too many assumptions which have not been tested by the parties directly involved. Here we refer to the Commission's "tentative approach to the *appropriate amount* of incentive."^{*} The approach simply is not understood by this carrier, and, once again, it appears not to take into considera-

^{*} Interim Report, sheets 6-10.

tion the needs of all carriers. Instead, it favors the carriers and shippers whose basic needs are unequipped box cars. It is not enough to say that the approach is "experimental," for this experiment could quickly cause irreparable harm.

In another area of the report, there is no apparent reason to support the conclusion* that a "6-month application of the incentive charges should bring distinct economic benefits." The SCL stands to lose a considerable amount of money, and its long-term car supply considerations would be affected adversely by the Commission's short-term experiment. It is very plain to this railroad that someone else will receive the "distinct economic benefits" at our expense, and to the detriment of our car supply program. This result, in turn, will be harmful to many shippers and receivers in the Southeast who appear not to have been considered by the Commission in its Interim Report.

CONCLUSIONS

The SCL recognizes that there exist many problems with respect to car supply. But, tentative, unreasoned, and unsupported requirements result only in inadequate and inequitable answers to the problem. Experiments are dangerous, not only because they can be harmful to the economy of carriers, but because they offer an insecure base upon which to make long-term arrangements and investments in expensive rail cars.

For the reasons stated, therefore, it is the position of the SCL that the "tentative conclusions" of the Commission cannot be supported by facts, that the carriers are entitled by law to a hearing on the vital

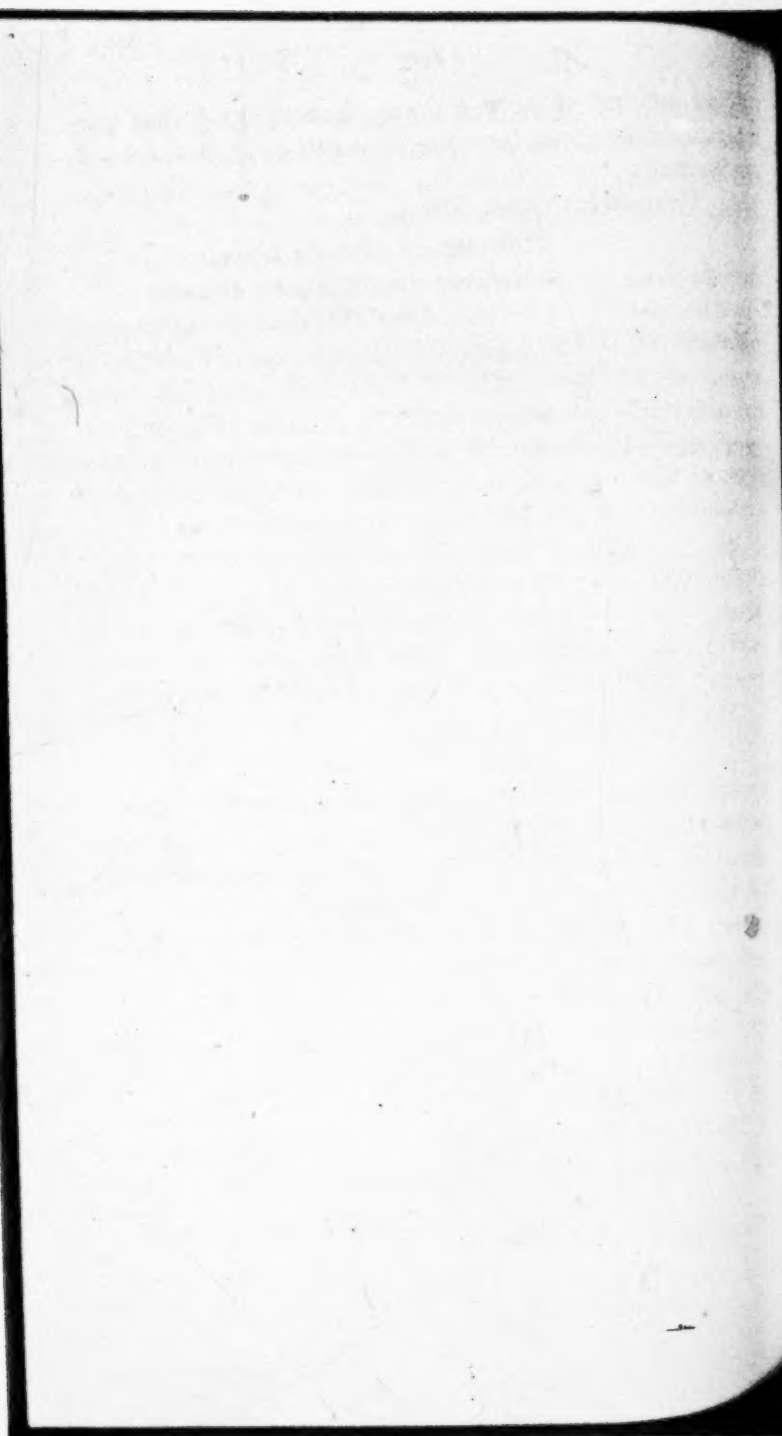
* Interim Report, sheet 10.

subject of incentive per diem charges, and that the interim order must be set aside until a proper record can be made.

Respectfully submitted,

RICHARD A. HOLLANDER,
*Attorney for Seaboard Coast
Line Railroad Company.*

MARCH 16, 1970.



**APPENDIX B TO DISTRICT COURT OPINION
BEFORE THE INTERSTATE COMMERCE COMMISSION
(Ex Parte No. 252 (Sub No. 1) Incentive Per Diem
Charges—1969)**

**REPRESENTATIONS OF FLORIDA EAST COAST RAILWAY COM-
PANY AND REQUEST FOR ORAL HEARING AND ORAL
ARGUMENT**

**A. ALVIS LAYNE,
EUGENE M. MALKIN,
*Attorneys for Florida East Coast
Railway Company.***

MARCH 17, 1970.

(29a)

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BEFORE THE INTERSTATE COMMERCE COMMISSION

**(Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem
Charges—1969)**

**REPRESENTATIONS OF FLORIDA EAST COAST RAILWAY COM-
PANY AND REQUEST FOR ORAL HEARING AND ORAL
ARGUMENT**

I. PRELIMINARY STATEMENT

By interim report and order served December 22, 1969, the Commission issued tentative findings and conclusions regarding the adequacy of plain box cars and the necessity for prescribing an incentive charge to be added to the basic per diem charges paid by railroads for use of plain box cars owned by other roads. The report proposes a schedule of incentive charges applicable to plain box cars during the period September 1 through February 28 of each year. The Commission's order, as amended, directs interested parties to file initial verified statements, briefs, or other responses to the interim report on or before March 17, 1970.

These representations and request for oral hearing and oral argument are submitted on behalf of the Florida East Coast Railway Company (FEC). Attached hereto and submitted on behalf of FEC are verified statements of E. L. Masters, Comptroller-Secretary of FEC, and R. P. Taylor, Assistant to the Vice President of FEC.

II. SUMMARY OF THE POSITION OF FEC

1. If the Commission decides to impose the proposed incentive charges on plain box cars, FEC should be exempted from payment of the charge because (a) FEC is a terminating railroad, (b) FEC has a surplus of plain box cars on its lines and the acquisition of additional plain box cars by FEC would be a wasteful and improvident use of resources, (c) operating practices of FEC assure efficient use and the prompt return of plain box cars received from connecting lines, and (d) imposition of the proposed incentive per diem charges would, in addition to the recently approved per diem-mileage charges, impose an unreasonable cost burden on traffic handled in plain box cars and on the entire operation of FEC.

The attached verified statements of Mr. Masters and Mr. Taylor establish, among other facts:

a. FEC can not efficiently use a larger number of plain box cars than those presently owned by FEC.

b. FEC consistently terminates a substantially higher percentage of interline carloads of freight, including freight moving in plain box cars, than it originates.

c. FEC can not load the plain box cars now on its lines; three of every four plain box cars are returned empty to connecting lines for lack of suitable revenue freight for such equipment.

d. FEC ownership of additional plain box cars would result in greater inefficiency in the use of box cars.

e. FEC now handles box cars promptly and efficiently and with a minimum of delay in the return of the cars to connecting lines; the imposition of an incentive charge would not produce a more prompt or efficient movement of cars by FEC.

f. FEC, because of operating conditions and geographic location, can not avoid being a substantial per diem debtor.

g. The proposed incentive charges, if applied to FEC's operations during the four-month period, September 1, 1969 to December 31, 1969, would have increased equipment rents by \$108,951.57, an average of \$27,000.00 each month.

2. FEC is opposed to the imposition of incentive charges on plain box cars and believes that an attempt to impose such charges on the basis of the evidence in this proceeding and the interim report of the Commission would be unlawful.

Imposition of the proposed incentive charges on plain box cars, without restructuring the rates, divisions, and demurrage charges to take account of the cost burden placed on terminating carriers, such as FEC, would be unlawful and would present substantial constitutional questions.

Imposition of the proposed incentive per diem charges can not be supported by the evidence in this proceeding. The data relied upon by the Commission in the interim report does not establish the existence of box car shortages or that the proposed incentive charge would be effective in reducing claimed deficiencies in the availability of box cars for shipper loadings. The conclusions in the interim report appear to contradict conclusions respecting the adequacy of existing car fleets and the availability of cars for loading expressed by the Commission at other places on the same record of railroad performance.

A hearing is essential as a matter of law under section 1(14)(a) of the Act to develop an adequate record on the basic factual issues to be resolved by the Commission. FEC, accordingly, requests an oral hearing and oral argument before the Commission.

III. FEC SHOULD BE EXEMPTED FROM INCENTIVE PER DIEM CHARGES

A. Congress provided in section 1(14)(a) an exemption from incentive charges for terminating lines

Section 1(14)(a), as amended, provides that "The Commission . . . may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest." The legislative history of Public Law 89-430, now section 1(14)(a), establishes that this provision was intended to authorize an exemption from incentive per diem charges for carriers, such as the FEC, terminating a substantially higher percentage of interline traffic than they originate. During the course of the hearings on Senate Bill No. 1098, later enacted as Public Law 89-430, it was repeatedly indicated that a railroad meets its common carrier responsibilities when it owns or otherwise provides freight cars of various types, which, together with foreign cars used in accordance with the car service rules, are sufficient in number to protect the loads it originates.¹

¹ See Statements of Chairman Webb of the Commission, *Hearings Before Freight Car Shortage Subcommittee of the Committee on Commerce*, United States Senate, 89th Cong., 1st Sess., Ser. No. 89-23, p. 13 (1965); and *Hearings Before Committee on Interstate and Foreign Commerce*, House of Representatives, 89th Cong., 1st Sess., Ser. No. 89-26 (1965), at page 44:

It is extremely difficult to determine whether the number of cars owned by a particular carrier represents a fair and equitable contribution to the total number required for a reasonably adequate national supply.

In general, however, it would seem that each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in number to protect the loadings it originates.

S. 1098 provided, as passed by the Senate, that the Commission was authorized to make any incentive element in per diem charges inapplicable "(1) to carriers determined by the Commission as owning an adequate number of freight cars to meet their responsibilities to the needs of commerce and the national defense; (2) to carriers which terminate a substantially higher percentage of interline traffic than they originate; (3) to types of freight cars the supply of which the Commission finds to be adequate; and (4) to such other cases or circumstances as the Commission finds to be in the public interest."¹ The House of Representatives substituted for this explicit provision the more general language now found in section 1(14)(a), authorizing exemption of any group of carriers if found to be in the national interest.² It is clear, however, that the change in language was not intended to remove the exemption of these groups of carriers from any incentive per diem charge. Debate on the bill in the House pointed out that the

¹111 Cong. Rec. 14827 (1965).

²With respect to the Senate Bill, Chairman Webb of the Commission, testifying before the House Committee on Interstate and Foreign Commerce, stated:

The Commission did not object to the Senate Amendment because all the factors specified therein would have been considered under the language of the bill, as introduced, and would be considered, of course, under the language of H.R. 7165. *Hearings Before the House, supra*, p. 5 n. 1.

Commission ' was to make exemptions on the basis of the factors specified in the Senate bill.'

The Senate acceded to the language used by the House. During Senate consideration of the amended bill, it was made clear that the revised language had not eliminated the objectives of the original bill and

'The comment of Commissioner William H. Tucker, the Commission's Acting Chairman of the Committee on Legislation, responding to a final proposed House amendment to S. 1000 designed to preclude any carrier exempted from incentive per diem payment from receiving payment, is particularly illuminating. Writing in opposition to the Kornegay amendment, Commissioner Tucker said, in part:

... Valid reasons may warrant a carrier being made exempt from paying an incentive element and yet remain entitled to receive an incentive element for its own cars. This may be because of the carrier's contribution to the car fleet, the type of carrier involved, or other considerations which may be developed during the hearing.

We also observe that the incentive element is intended not only to encourage carriers owning an adequate supply of cars to build more cars, but to provide those carriers owning an adequate supply a sufficient return to encourage them to continue to build more cars. Under the suggested proposed amendment, however, it would appear that a carrier exempted from paying the incentive element because it has an adequate supply of cars, would also be precluded from receiving the incentive element necessary to encourage it to contribute to the freight car supply. 112 Cong. Rec. 9961 (1966).

The Kornegay amendment was later defeated, leaving the more general language intact. *Id.* at 9964.

'The Chairman of the House Interstate and Foreign Commerce Committee stated:

... This provision enables the Commission to make exemptions from paying an incentive by class of carrier, and permits the Commission to consider the several factors specifically authorized in the Senate Bill. 112 Cong. Rec. 9946 (1966).

He further stated during debate:

... all this does to the House (sic) version is just sharpens up the objectives and aims. ... It does give to the Interstate Commerce Commission the opportunity, after hearings, to exempt certain railroads. This is intended for railroads in the gentleman's area [Massachusetts], as the gentleman knows. *Id.* at 9962.

that the statute was to be administered as to exempt from any incentive per diem terminating railroads and those railroads with an adequate supply of cars.*

Senator Pastore later asked Senator Magnuson, Chairman of the Senate Commerce Committee, whether the bill, as changed by the House, retained the provision involving a terminal line like the New Haven. Senator Magnuson replied, "That is in the bill." *Ibid.*

The Commission's interim report does not consider whether any rail carrier or class of rail carriers should be exempted from payment of the proposed incentive charges. A final determination to impose incentive charges will require Commission consideration and decision on this point. The verified statements of

*Senator Cotton said during Senate consideration of the bill, as changed by the House of Representatives:

The aim of these provisions of the Senate Bill, which I had a part in suggesting, was to assure reasonable and fair consideration of the special problems arising in the industry, including the problem of terminating railroads, whose per diem charges are not related to the number of boxcars they may own.

In the bill before us today, as it has come back from the House of Representatives, the four types of circumstances spelled out in the Senate bill are not directly listed. It is clear, however, that all the factors listed in the Senate bill still have to be considered by the Interstate Commerce Commission, and the Commission would have the power, and the duty, not to apply the incentive element to any group of carriers, and even a single carrier, where those four circumstances, or any other circumstances, made it in the National interest to do so.

* * * *

I am supporting these amendments with the understanding that it is clear from the extensive legislative history of this bill that it gives the Commission the power, and the responsibility to exempt from the incentive per diem those carriers who terminate a substantially higher percentage of interline traffic than they originate. I am confident that the Commission recognizes its responsibilities in this respect and that the intent of the Congress will be fully implemented. 112 Cong. Rec. 10250-10251. (1966).

Mr. Masters and Mr. Taylor contain detailed evidence supporting FEC's exemption from any incentive charge. We set out below, in summary fashion, the factors establishing that FEC should be exempted from any incentive per diem charge.

B. FEC is a terminating line with a surplus of plain box cars

FEC is a terminating railroad because of geographic location, the consist of its traffic, and the operating conditions unique to its lines.

FEC's main line parallels the east coast of Florida between Jacksonville and Miami. FEC connects at Jacksonville with the Southern Railway and Seaboard Coast Line.

In the six-month period, September 1, 1968 through February 28, 1969, FEC terminated 47,118 carloads of revenue freight but originated only 24,731 carloads. The ratio of plain box cars loaded to those terminated was even lower during this period—12,180 terminated and 3,402 loaded. During the 17-month period beginning September 1, 1968 and ending January 31, 1970, FEC terminated 33,301 plain box cars and loaded only 8,733. Virtually all loaded box cars moved by FEC are received at Jacksonville for southbound movement and are returned empty to Jacksonville. Thus, in January and February 1970, FEC received from connections 3,586 plain box cars but delivered to connections empty 2,527 plain box cars.

FEC's position as a terminating road is further affected by the fact that most of the traffic received from connecting lines terminates at the south end of the line—the area of West Palm Beach and south, including Miami. For instance, of 87,445 cars received from connections in the year 1969 destined to all stations served by FEC, 61,753 were received at Jackson-

ville for termination at West Palm Beach and south, including Miami. As a result, FEC is compelled to move foreign interline cars virtually the entire length of the Florida peninsula and the return to Jacksonville empty. FEC's ratio of empty to loaded car-miles reflects this operating situation. In 1969, the ratio was 94 percent. The ratio has been 90 percent or more in every year since 1962.

FEC is a terminating line because the products shipped from the east coast of Florida, the area served by the lines of FEC, are generally not suitable for movement in the equipment used to transport incoming traffic, in addition to the fact that the southbound volume of traffic exceeds northbound shipments. During 1969, FEC received from connections 87,445 carloads of revenue freight, while originating and delivering to connections 48,359 carloads. Of the 48,359 carloads delivered to connections, 37,808 cars were farm produce requiring movement in refrigerator equipment. The freight received from connections, on the other hand, required box, gondola, hopper, and flat cars not suitable for farm produce originated by FEC.

Acquisition by FEC of any substantial number of box cars under these operating conditions is useless and an improvident use of resources. Additional plain box car ownership would result in either non-use of the equipment or further inflation of empty miles of car use. Imposition of the proposed incentive charge would not, under these circumstances, provide an incentive for the addition of plain box cars by the FEC.

C. FEC moves plain box cars with dispatch and returns foreign cars to connecting lines promptly

FEC has been successful in moving foreign cars efficiently and in holding the time plain box cars of

foreign ownership spend on line to a minimum. The train and switching schedules, the car distribution and control program, and other operating procedures used by FEC to expedite movement of cars are detailed in Mr. Taylor's verified statement. FEC's average time on line (from date received to date of return to connections) of plain box cars is less than seven days. On multi-level rack cars, where there is no delay in unloading by the consignees, FEC has consistently achieved the highest average number of miles per day of any railroad in the United States. Any significant reduction in the time plain box cars remain on FEC's line must come from a reduction in the unloading time of consignees.⁷ It is certain that the imposition of an incentive charge on plain box cars in the amounts proposed by the Commission or in any other amount to be paid by FEC will not and can not produce a more efficient use of plain box cars by FEC.

D. Incentive charges would impose an unreasonable burden on FEC

FEC is and has always been a substantial per diem debtor. In 1969, net car hire payable by FEC was \$1,777,417, approximately 51½ percent of total railway operating revenues. If the proposed scale of incentive charges had been applied to the plain box cars handled by FEC during the months of September through December 1969, FEC car hire would have been increased \$108,951.57, an average of \$27,000 per month. This is a significant increase in the cost of handling freight moving in plain box cars. This pro-

⁷ Present rules generally allow 48 hours free time for unloading on domestic traffic and five days free time on port traffic. FEC serves ports at Miami, Fort Lauderdale (Everglades), Palm Beach, and Fort Pierce.

posed incentive charge, moreover, will in the future be added to increased per diem charges prescribed by the Commission in Docket No. 31358. If these increased per diem-mileage charges had been effective during the months of August through December 1969, the basic per diem charge for plain box cars would have averaged \$5,000 higher per month.*

FEC has not had adequate time to determine the extent to which the additional cost of the proposed incentive charge would make traffic moving in plain box cars non-compensatory at existing tariff rates and charges. One fact, however, is certain. The proposed incentive per diem alone, applied over a period of six months, would exceed the net railway income of FEC in 1967 and 1968.

IV. NEITHER THE INTERIM REPORT NOR THE EVIDENCE BEFORE THE COMMISSION ESTABLISHES THAT AN INCENTIVE CHARGE IS JUSTIFIED OR THAT THE PROPOSED CHARGE WILL ACHIEVE THE OBJECTIVES SPECIFIED IN THE ACT

The conclusions as to the adequacy of the supply of plain box cars in the interim report are based upon data reported by rail carriers in response to directions and forms furnished by the Commission. The study is described in Appendix A and the data obtained is summarized in Appendices C and D of the interim report. The information furnished to the

* Application of the per diem charges prescribed in Docket No. 31358 to all types of cars including plain box cars handled by FEC during September-December 1969 results in an average monthly increase for FEC of \$8,000 in per diem costs, an increase of 4 to 5 percent in per diem charges. Little, if any, of the increased cost will be offset by increased receipts from foreign line use of FEC cars because of the type of car owned by FEC and the short-haul movements in which FEC cars now participate.

Commission in this study also formed the basis of a report made by the Commission to the Senate Commerce Committee in May 1969. In that report, the then Chairman of the Commission stated that an analysis of the data showed:

. . . [E]very zone has had available daily a supply of every type which exceeded demands [by shippers], represented by orders on hand at the beginning of the day, and by orders requesting placement on the same day. In most cases, the daily receipt of cars has exceeded such orders and the cars on hand at the beginning of the day substantially exceed current demands.*

The Chairman further characterized the current shortage not as a lack of an adequate supply, but rather as "a failure in actually placing available cars in response to a shipper request."¹⁰

In these circumstances, the number of plain box cars owned by railroads can not be found the cause of any failure promptly to supply cars to shippers. More importantly, there is no factual basis for a conclusion that an increase in the number of plain box cars would result in the prompt placement of box cars at stations reporting an inability to furnish all cars on the day ordered. Additional cars would undoubtedly fall into existing patterns of dislocation. A supply of box cars adequate to make all placements on the day ordered at all stations in the United States at all times of the year would require astronomical numbers of cars. Such level of ownership would be wasteful and inefficient in the extreme. It is doubtful,

* See Statement of Virginia Mae Brown, Chairman, Interstate Commerce Commission, *Railroad Freight Car Shortage Before Committee on Commerce*, United States Senate, May 13, 1969, p. 8.

¹⁰ *Id.*, Statement at p. 8.

to say the least, if the railroad industry could finance car ownership at such a level. The enormous cost of service that such a level of ownership would impose on commodities moving in box cars could never be justified.

The interim report treats the failure to place a box car on the day ordered as a deficiency. This is an unreasonable standard. The Commission's report to the Senate Commerce Committee pointed out the difficulties in this standard of performance. Chairman Brown told the Senate Committee:

Reliance on these statistics for a measure of any inadequacy of car supply, of course, involves an assumption that it is reasonable to require the railroads to fill every order on the day for which the cars are requested and that a shipper who requests prompter service, no matter how preemptory that request may be in relation to the demands of all shippers for the same type of car, is entitled to such service. This assumption may be unwarranted, and the study provides data by means of which allowance can be made for the effect of the assumption.¹¹

* * * * *

... the data seem to warrant the conclusion that, with the present efficiency of car distribution, delay in filling orders within two days after they are received so far as orders requesting placement on the day they are filed or the first day thereafter should not be considered excessive.¹²

The members of the Commission's own staff with experience in car service matters have repeatedly stated under oath that is unreasonable to expect car-

¹¹ *Id.*, Statement at p. 14.

¹² *Id.*, Statement at pp. 16-17.

riers to place cars within 24 hours of receipt of an order, particularly in periods of peak demand."

Mr. Taylor's verified statement, attached to these representations, details the practical operating problems that may and do prevent placing a car at a shipper's location for loading on the day the car is ordered, even though the carrier has an ample supply of suitable equipment. This evidence establishes that, at least for the FEC, the data obtained in the Commission's study as to "deficiency" in placement can not be related to the adequacy of the number of cars owned by rail carriers.

V. IMPOSITION OF INCENTIVE CHARGES WITHOUT RESTRUCTURING EXISTING RATES AND DIVISIONS WOULD BE UNLAWFUL AND RAISE SERIOUS CONSTITUTIONAL ISSUES

Imposition of the proposed incentive charge would require substantial changes in the existing rates, divisions, and demurrage charges on traffic moving in plain box cars. Substantial increases in the FEC revenues for handling such traffic would be essential.

The heavy burden that an incentive charge might place upon the terminating carriers was recognized during the Congressional hearings on the present section 1(14)(a). Testifying on S. 1098, Chairman Webb observed that, to the extent incentive per diem increased the burden upon terminating carriers, such as the Boston and Maine and New Haven, that burden could be offset through an appropriate adjustment of the divisions between carriers.¹⁴

FEC recognizes that any proposal to modify existing rates or divisions of revenue would present a number of important issues. For example, any division of

¹³ See Ex Parte No. 241, testimony of Witness Klima, Tr. 356-359, 1234, 1236.

¹⁴ *Hearings Before the Senate, supra*, p. 5 n. 1.

revenue between carriers be adjusted to permit recovery of the increased per diem incurred without actually nullifying the incentive intended by the Act? Are incentive per diem payments to be considered as part of the operating cost of a rail carrier for purposes of rate regulation and, accordingly, considered as justification for an increase in rates?

This incentive per diem proceeding rests upon the proposition that the FEC is responsible for a share of the national demand for freight cars. The national demand for cars is the total of the demands made on all railroads. Demand for cars to transport any commodity depends upon a number of factors, including the rate established by the railroad or railroads involved vis-a-vis other modes of transport. Competition from other carriers, and from other modes of transportation, have led to reductions that may produce noncompensatory rates unless the traffic is moved in newly designed cars rather than standard box cars.¹¹ The result is that such railroads can and do create a requirement for additional box cars through rate adjustments. Demand for cars and the need for additional cars to move traffic tendered to railroads may be affected by operating practices of the carriers. FEC has no way to control or veto the rates for the movement of shipments in which FEC does not participate. Nor does FEC control the practices of other lines affecting the use of and need for cars. How then can FEC be responsible for supplying a share of the equipment made necessary by these rate practices?

Unless exempted from the imposition of any incentive per diem, much of the interline traffic now han-

¹¹ See, e.g., I&S Docket No. 7656, *Grain In Multiple-Car Shipments—River Crossings to the South*; and the application of reduced rates to movement of grain in conventional box cars as well as in jumbo hopper cars.

dled by FEC will be transported at a loss. As a common carrier under section 1 of the Act, FEC is obligated to provide transportation service upon reasonable request and participate in through routes. FEC may not be able, therefore, to decline to transport over its lines loaded cars which carry an incentive or an increased per diem rate. The Act, however, specifies that a railroad shall be permitted to charge and receive just compensation for services required to be performed. Imposition of incentive per diem, at a level which is either in excess of just and reasonable compensation to the car owner or results in the receipt by FEC of less than just compensation for services performed, would raise substantial questions affecting the validity of this proceeding and the underlying statute.

VI. REQUEST FOR ORAL HEARING AND ORAL ARGUMENT

Oral hearing and oral argument are required to develop an adequate record for disposition of this proceeding and to comply with applicable statutes.

Section 1(14)(a) of the Act authorizes the Commission "after hearing" to fix the compensation, including elements of incentive, paid by railroads for use of cars owned by other roads. The legislative history of that section establishes that Congress contemplated unrestricted public hearings.¹⁶ Moreover, since Commission imposition of an incentive charge involves a determination that is "required by statute to be determined on the record after opportunity for agency hearing,"¹⁷ an oral hearing is required by section 7

¹⁶ 112 Cong. Rec. 9945, 9953-54 (1965).

¹⁷ 5 U.S.C. § 554(a).

of the Administrative Procedure Act." Section 7 of the Administrative Procedure Act further provides that the proponent of the rate or order has the burden of proof. That burden is not discharged by an "interim" Commission report containing evidentiary findings and conclusions based upon data collected from the individual railroads. Adversely affected railroads must be provided an opportunity to test the factual claims and the reliability of the underlying data through cross-examination.

FEC expects at an oral hearing to compel the attendance of those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in Ex Parte No. 252." FEC expects to establish, by cross-examination of such persons, the following facts, among others:

a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region.

b. Railroad ownership of additional plain box cars would not necessarily change the results summarized in the appendices to the interim report.

c. No computation has been or can be made on the evidence before the Commission in this

"5 U.S.C. § 556(d), in pertinent part, provides: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

"A list of such persons will be supplied by FEC as required by Commission procedures in advance of the hearing.

proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year.

d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

CONCLUSION

FEC submits that the proposed incentive charge should not be imposed or, alternatively, FEC should be exempted from any incentive charge prescribed in this proceeding.

Respectfully submitted,

A. ALVIS LAYNE,
EUGENE M. MALKIN,
*Attorneys for Florida East Coast
Railway Company.*

MARCH 17, 1970.

NOTE.—(Supporting Statements and Statistical Data have been omitted by the Court from this document.)

APPENDIX B

**United States District Court Middle District of
Florida, Jacksonville Division**

(No. 70-574-Civ-J)

**FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION,
FLORIDA EAST COAST BUILDING, ST. AUGUSTINE,
FLORIDA, PLAINTIFF,**

v.

**UNITED STATES OF AMERICA AND INTERSTATE COM-
MERGE COMMISSION, DEFENDANTS.**

(No. 70-577-Civ-J)

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF,

v.

**UNITED STATES OF AMERICA AND INTERSTATE COM-
MERGE COMMISSION, DEFENDANTS.**

ORDER MODIFYING JUDGMENT

IT IS ORDERED by the Court:

1. The Motion to Modify Judgment pending Appeal (filed April 5, 1971) of the United States and the Interstate Commerce Commission is granted to the extent that the plaintiffs are ordered to continue to maintain the accounting records described in the August 31, 1970, order of this court until such time as the Supreme Court of the United States shall dispose of this cause on appeal or until that Court shall modify or dissolve this order, whichever occurs first; provided

however that if defendants fail to take a timely appeal from this court's order of February 18, 1971, the aforesaid requirement that plaintiffs keep and maintain accounting records shall terminate as of April 17, 1971.

2. Said Motion to Modify Judgment Pending Appeal is in all other respects denied.

DONE and ORDERED at Jacksonville, Florida, this 14th day of April, 1971.

BRYAN SIMPSON,

United States Circuit Judge.

WM. A. McRAE, Jr.,

United States District Judge.

CHARLES R. SCOTT,

United States District Judge.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided December 12, 1969

Upon investigation, certain tentative conclusions reached regarding the incentive element to be added to the basic per diem charges paid by railroads for the use of boxcars owned by other railroads. Appropriate rules and regulations embodying those provisional conclusions proposed. All parties and other interested persons are invited to file further statements of facts, views, and arguments respecting these tentative conclusions and the proposed rules and regulations.

Appearances as shown in Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11, and in addition *Richard M. Freeman, F. J. Melia, George M. Onken, R. H. Stahlheber, and James L. Tapley* for interested parties.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

This interim report reflects our tentative conclusions, reached pursuant to section 1(14)(a) of the Interstate Commerce Act, as to the adequacy of the national freight car supply and a provisional judgment regarding the form and amount of an incentive charge that will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. Interested persons will be given the opportunity to present evidence and arguments with respect to these interim conclusions.

BACKGROUND

This investigation was instituted on our own motion primarily under section 1(14)(a) of the Interstate Commerce Act as amended by Public Law 89-430 (80 Stat. 168). That amendment, effective September 1, 1966, requires that—

In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

The proceeding was initiated by a notice of proposed rulemaking of December 15, 1967, following the earlier dismissal of the proceeding in *Ex Parte No. 252, Incentive Per Diem Charges*, 332 I.C.C. 11, decided October 3, 1967. The notice, published at 42 F. R. 20987, named as respondents all common carriers by railroad subject to the Interstate Commerce Act, directed the Bureau of Enforcement of this Commission to participate, and established procedures for the compilation of data during 1968 which we stated we would need in the cited decision.

At the time we issued the prior report, the only information which was available to us directly bearing on the adequacy of the national car supply was contained in the so-called CS-44 reports of member railroads to the Association of American Railroads and a 1-month study made by the railroads in connection with the proceedings in *Ex Parte No. 241*.¹ The CS-44 reports list as shortages the cars ordered placed for loading in excess of the number actually placed, provided the orders remain unfilled for 24 hours prior to 6 p.m. of the reporting day. The CS-44 reports also list as surplus the cars which are in excess of those needed to fill existing or anticipated orders for the next day. The railroads expressed reservations and criticisms of these data, leading us to find in the prior report that the data in those reports could be given little weight.

We, therefore, recognized in our prior report a need for data systematically collected on scientific bases which would show the

¹See *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 261.

demand for railroad freight cars, the supply of cars on hand to meet such demand, and the manner and extent to which the demand was met. We then saw, for example, only an unsatisfied demand for cars without any indication of the extent to which surplus cars could be used to meet the unsatisfied demand. We expressed our concern with the paucity of data then before us and stated that, "An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types." (332 I.C.C. at 15.) We stated further that we needed information necessary to make a decision on the quantum of an incentive charge. To that end this proceeding was initiated.

In the notice of proposed rulemaking of December 15, 1967, we required all common carriers by railroad subject to the act to participate in a study of car demand and supply conditions throughout the country. The manner in which the study was conducted, and the results thereof, are described in appendix A to this report. The data thus developed are persuasive that a shortage in the supply of plain boxcars is a significant factor in the inability of many railroads to fill shippers' car orders. The data show that there are definite limits to better utilization of the existing fleet of cars within each region; over a period of many months in 1968, the shortage in supply of cars probably could not have been relieved by known methods of greater utilization of the car supply.

ROLE OF INCENTIVE PER DIEM

In the 1966 amendment to section 1(14)(a) of the act, Congress required us to determine whether incentive per diem has a role in the adequacy of the national freight car supply. By "incentive" the statute refers to a rate of return beyond mere compensation for risk taken. It refers to compensation for risks that might within reason have been taken for the promise of higher returns. Given such a return, railroad management should accord at least some consideration to freight cars as one alternative form of investment.

In the prior report, we hesitated to adopt an interim incentive per diem that we found would not bring about any change in operating practices or in any commitment for the purchase of additional equipment. On the other hand, mindful of the large regional car surpluses that existed simultaneously with reported shortages, it was further noted that incentive per diem must take into account

a reasonable prospect of efficient year-round use of equipment and avoid encouraging uneconomical investment in excess capacity.

We then did not stress the continuing heavy demand for the standard boxcar. Shipper need for the standard boxcar still far exceeds the need for any other type car. The present data show that despite the introduction of new types of equipment, demand for the standard boxcar cannot be satisfied from existing sources of equipment for at least half the calendar year. A long-term incentive per diem does not seem likely to add large numbers of boxcars to the national fleet in the near future; but it may at least alleviate the problem of car shortages over a period of several years.

An incentive per diem applicable on boxcars during the fall and winter, in our view, should tend to speed up the use and movement of cars in those periods and should encourage the return of cars to their owners. If it fails in this regard, such a 6-month application of the incentive element should, we think, nevertheless produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars. Significantly, many of the creditor roads are in the Midwest, the same region that displays the heaviest concentration of deficiencies² for half the year. If the incentive were not effective in returning cars to their owners, and thereby relieving the shortages in the Midwest, the railroads in that zone would become the beneficiaries of funds for the future purchase of additional plain boxcars.

The incentive might tend to encourage the acquisition of additional boxcars by carriers in all zones. The debtor per diem roads would have the choice under the incentive charge either to purchase more cars (and return foreign cars more promptly) or to pay an incentive charge that would permit the creditor roads to purchase more cars. In either event, we are of the tentative view that the incentive charge should operate in a manner fully consistent with the language and purposes of section 1(14)(a).

To remove some of the doubt regarding the effect of an incentive charge on car supply, we now propose that incentive funds be "earmarked"—a requirement described later herein—as a measure of assurance that increased per diem credits resulting from the incentive eventually find their way into new cars. Admittedly, as we said with regard to one aspect of basic per diem, freight

²The use of this term to mean a failure to fill orders and an *ad hoc* definition of "shortage" for the purpose of analysis are set forth in appendix A.

cars are built to earn revenue and not per diem money. So saying, however, we cannot at the same time exclude the possibility underlying section 1(14)(a), that increases in per diem charges will help the roads acquire the cars they need to earn the revenue.

We emphasize that the proposed incentive charges are both tentative and experimental. Before becoming effective, they are open to comment and criticism, including oral hearing should the circumstances warrant. After becoming effective, they may be modified as future circumstances require. Here, as with basic per diem, we envision an open-ended proceeding, whereby studies, suggestions, and proposed changes may be submitted as the charges are tested in the light of actual experience.

Amount of incentive per diem.—Tables showing the incentive per diem charges here proposed are set forth in the order appended to this report. The relation of this charge to the basic per diem time charges prescribed by us in *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 332 I.C.C. 176, is shown in appendix B to this report.

Our tentative approach to the appropriate amount of incentive assumes that the overall rate of return earned by nonregulated, higher risk corporations in a recent year should, if applied to the per diem charges, produce an incentive among the railroads to consider investment on a regular and increasing basis in the national boxcar fleet. Rather than invest in a nontransportation enterprise, railroads obtaining an incentive per diem charge should likely direct attention and funds to the supply of plain boxcars.

A model for the construction of such a rate of return figure may be found in the balance sheet and income figures in "Statistics of Income," compiled by the United States Department of the Treasury, Internal Revenue Service (IRS).³ Under section 6108 of the Internal Revenue Code, IRS is required to compile annual statistics from the tax returns of corporations. Beginning with "Statistics of Income" for 1951, the corporate data have been derived from a stratified sample, selected before audit, of returns of domestic and resident foreign corporations not exempt from income tax. Data are obtained for all corporations, manufacturing and nonmanufacturing and whether or not they have taxable income. The IRS universe includes all corporations, as defined by the Internal Revenue Code, organized for profitmaking purposes.

³The data are also available in *Source Book, Statistics of Income, 1966*, compiled by the United States Treasury Department, Internal Revenue Service, Statistics Division.

INTERSTATE COMMERCE COMMISSION REPORTS

For 1966, the latest available year, IRS reported on the returns of 1,468,725 corporations; of these, 939,846 reported net income. The composite net income before taxes available to service the capital structure of all the reporting corporations was 12.43 percent in 1966. After taxes the net income of these same corporations comprised the much lower rate of return on net assets of 8.9 percent, as shown in the table below.

RATE OF RETURN ON NET ASSETS, ALL CORPORATIONS—1966

	<i>In billions</i>
1. Total assets -----	\$1,844.1
2. Less: Accounts payable -----	\$ 99.2
3. Other current liabilities ---	618.5
4. Other liabilities -----	211.8
5. Total deductions -----	929.5
6. Net assets -----	914.6
7. Net income before taxes and interest -----	113.8
8. Federal income taxes after investment credit -----	32.4
9. Net income -----	81.4
10. Return on net assets before taxes (Line 7 ÷ line 6) -----	12.4 percent
11. Return on net assets after taxes (Line 9 ÷ line 6) -----	8.9 percent

The IRS data, insofar as they reflect the operation of railroads, reveal that on the foregoing basis the railroad return on net assets before taxes in 1966 was 3.8 percent.

Upon consideration of the IRS figures, the higher interest rates of the present period, the return figures earned in the more current years, the generally lower actual tax rate paid by the railroad industry in comparison with corporations in general,⁴ and the differing purposes as between basic and incentive per diem, we provisionally conclude that the addition of an incentive element to the basic charges should produce an annual 12-percent rate of return on the investment in general service, unequipped boxcars in lieu of the 6-percent rate of return we included in the basic charges alone.

The dollar value of the incentive return element is computed in appendix B, page 3. The computation is premised on a 30-year life of a boxcar with a 10-percent salvage value and a cor-

⁴In 1966 the class I railroads paid \$186.3 million in Federal income taxes and surtaxes from \$1,090 million of net income. In 1965, the class I railroads paid \$66.1 million in Federal income taxes and surtaxes from \$630.6 million of net income.

responding annual depreciation rate of 3 percent. The net investment per \$1,000, therefore, declines by 3 percent per year in the appendix; and the incentive return of 6 percent is computed on the basis of the declining investment.

Each 5 years of incentive return are then grouped and averaged on a per-year basis (the total incentive over 5 years divided by 5), and then on a per-day basis for 6 months (the annual average divided by 171 days).⁵ The reasons for employing a 6-month factor are described later. Suffice it here to say that the computation provides an incentive per diem charge collectible over 6 months for cars of various ages, a very useful tool that is employed in appendix B, pages 1 and 2, to develop the incentive per diem charge set forth in the attached order. Thus, in appendix B, page 3, for a car originally costing \$1,000 that is now 16 to 20 years old (group D), the average incentive return element per day will be 16.67 cents. The per-day charge is then carried over to the tables on pages 1 and 2, and forms the multiplier for the entire incentive column under "group D" in the attached order.⁶

To obtain the incentive charge for a car in which the cost exceeds \$41,000 it is necessary only to multiply the incentive charge per \$1,000 shown in appendix B, page 3, for the applicable age group times an amount representing the midpoint of the cost bracket in which the car falls. For example, the incentive charge for a group B car in the \$47,000-49,000 cost bracket would be computed by multiplying 27.19 cents times 48.

Six-month application of the charge.—The basic per diem rates, providing compensation for one carrier's use of the cars of another, apply throughout the year. The rule set forth in the appended order applies the incentive charge only during the fall and winter months of each year.

As explained in appendix A to this report, the heavy-loading period extended over a large number of months in 1968. In some years, it has been longer. The carriers cannot be expected to make sufficient use of their surplus cars to meet shipper demand in this period, and, accordingly, a shortage may be said to exist within the meaning of the statute in such period, which shortage, we believe, may be alleviated by incentive charges.

⁵Cars that are over 30 years old have been depreciated down to their salvage value of 10 percent. The annual average incentive return per \$1,000 of original investment is therefore \$6, or 3.51 cents per day over the 6 months in which the incentive charge is collected.

⁶Under group D, the incentive return element per \$1,000 of investment is multiplied by the midnumber of thousands of dollars of original cost in each cost bracket; for example, for the \$13-15,000 bracket (group D, line 8) the table multiplies 14 times 16.67 cents to obtain the incentive return element.

A 6-month application of the incentive charges should bring distinct economic benefits. The IRS data earlier discussed suggest an overall 12-percent rate of return as the basis for an incentive charge. Such a rate of return represents a doubling of the rate of return applicable under the basic per diem charges. The application of the incentive charge during the heavy-loading period permits us to place the burden of paying the heavier charge on the debtor roads during the period of heaviest demand and hence during the period of their greatest ability to pay.

By bunching the incentive element into a 6-month period, the effective rate of return in that period will be 18 percent, if the rate of return throughout the year is to be 12 percent. The computation underlying this statement is the following:

Rate of return during slack period (or 1/2 year times 6 percent)	= 3 percent
+ Rate of return during peak period (or 1/2 year times 18 percent)	= 9 percent
Annual rate of return	12 percent

The per diem charges in the peak period resulting from the use of an 18-percent figure should stimulate the faster return of cars to their owners in that period and thereby also decrease the regional imbalance in cars in that period. The fact that the incentive charge will also appear in the heavy-loading season should also stimulate the debtor roads themselves to purchase cars by presenting them with a choice of buying cars or using others' cars at times when the heavy traffic is moving and larger revenues are earned. By bunching the annual incentive return element into 6 months, the choice confronting the debtor roads is sharpened without increasing the annual incentive return earned by the creditor roads beyond the reasonable level indicated by the rate of return study.

Earmarking of funds.— A condition to the imposition of an incentive charge on boxcars which we tentatively propose is that the recipients of the incentive element set aside the net incentive balances into account 716, Capital and Other Reserve Funds, and account 797, Retained Income, Appropriated, as earmarked funds for the purchase, building or rebuilding of general service, unequipped boxcars. The purpose here is to preserve to the carriers maximum flexibility and discretion consistent with the tentative conclusion that the standard boxcar is in short supply and that the proposed increase in per diem charges pursuant to section 1(14)(a) is warranted to remedy that shortage.

We do not propose to prescribe the timing of additional boxcar purchases; we leave this to the carriers. Second, we do not propose to define the financial terms under which funds might be drawn down in any given year. A drawdown might be used to pay the full cost or a downpayment, or used to meet any prior commitment on any cars which were initially purchased in part by the use of earmarked funds. Third, we do not intend to affect the carriers' election to buy a particular subtype of general service, unequipped boxcars. Finally, no prior Commission approval would be needed for a drawdown that is otherwise consistent with this decision.

The earmarking requirement would apply only to the net credit balances resulting from the payment of the incentive charges. The unexpended funds remaining in the accounts of the carriers could be invested in Government bonds or other interest-bearing, temporary securities. The interest earned thereafter would become part of the fund.

The level of the proposed incentive charges, in our present judgment, would provide the carriers with an incentive to make regular and increasing commitments to the national boxcar fleet. We cannot, of course, be certain of this. Actual experience under the incentive charges may convince us in the future that earmarking should be modified or eliminated. We intend, by the earmarking requirement, to insure that the funds created by the incentive charge for the purpose of alleviating a national boxcar shortage are, in fact, eventually used for that purpose and no other.

Incentive per diem formula.—If the incentive per diem is to serve the alternative purpose of augmenting the freight car fleet, earmarked funds should not be used for the purpose of normal car replacement. The incentive charge was not adopted by Congress merely to maintain the *status quo* within the national car fleet.

The rule we here propose authorizes those railroads which will benefit from the net balances arising out of the incentive charge to expend those balances only for the costs of building or purchasing new general service, unequipped boxcars, or rebuilding older ones, beyond their normal annual outlays of funds for such purposes. We here seek at least to reduce the rate of decline in the national supply of general service, unequipped boxcars compared with levels that have pertained in recent years. In our judgment, the last 5 years of reported data (1964-1968) provide a fair gauge of the response of the railroad industry to the need for additional cars.

The table in appendix F sets forth a tabulation of the average number of new general service (equipped and unequipped) boxcars purchased or built in the period 1964-1968, as well as the average number of rebuilt boxcars, for the major per diem creditor railroads.⁷ This table also shows in how many of the 5 years each road installed more or less than its 5-year average. The table suggests that the 5-year average substantially reflects current annual practice relating to installations of new cars. The data relating to rebuilt cars are quite sparse; and the average has generally been a low figure, often zero, for most roads.

Each railroad would be required under the proposed rule to average its number of new boxcars purchased or built and installed (general, unequipped) in the period 1964 through 1968, and separately the number of rebuilt and installed boxcars (general, unequipped) for the same period. It may thereafter use earmarked balances to purchase or build any number of general service, unequipped boxcars in a given year after it has purchased or built the 1964-1968 average number of such boxcars from other funds. Earmarked balances may be used to finance the whole or any part of cars purchased or built only after the average number have been purchased or built. Similarly, any carrier may rebuild older boxcars, in whole or in part, for general service from earmarked funds only after it has rebuilt its 1964-1968 average number of general service, unequipped boxcars.

For some railroads, such as the Burlington, it may be relatively easy to gear annual purchases to their 5-year average. For others, it may be necessary to defer annual purchases from the fund until the need arises for the purchase of cars in excess of the 5-year average. The carriers are given this election under the formula proposed.

It may be that railroads comprising one system would prefer to combine net debit or credit balances and compute a single average for the 1964-1968 period. If carriers make such election, they would be expected to apprise our Bureau of Accounts in writing prior thereto, setting forth the assents of all carriers participating in the election.

⁷The table reflects the data for railroads which in 1968 had per diem credit balances in excess of \$1 million, except four smaller railroads which specialize in other types of cars, and one (Missouri-Illinois R.) where the data were incomplete.

GENERAL OBSERVATIONS

Although we cannot know whether incentive per diem will succeed, we do know that there are serious car supply problems, and that we possess the statutory authority to add an incentive element in an effort to solve them. We are issuing the present report in the belief that tentatively we now have sufficient data to reach a conscientious and informed judgment regarding the form and amount of an incentive charge that will continue to provide just and reasonable compensation, while both improving car utilization and increasing car supply. The solution proposed, we emphasize, is tentative only. The respondents and all other interested parties will be given the opportunity under the order issued concurrently with this report to set forth statements of position and in verified form any statements of fact they desire to add or to contest on this record. We earnestly hope for the cooperation and assistance of all concerned in this effort to resolve what is undoubtedly one of the most difficult and far-reaching problems today confronting the rail freight transportation industry.

An appropriate order will be entered.

VICE CHAIRMAN STAFFORD, concurring:

In my dissent in Ex Parte No. 252, I indicated that the evidence in support of an exact incentive per diem was slight but that the Commission should use every facility at its disposal to alleviate the shortage of rail cars in those areas plagued by yearly car shortages. I felt that the Commission was wasting valuable time in ignoring the mandate of Congress to insure the adequacy of the national railroad freight car supply by discontinuing that proceeding. Accordingly, I am concurring in the revised interim report in the hope that this proceeding may be concluded as expeditiously as possible.

COMMISSIONER MURPHY, concurring:

I agree with the majority that affirmative action to implement Public Law 89-430 without undue delay is essential. My position with respect to Public Law 89-430 was expressed in my dissenting opinion in *Incentive Per Diem Charges*, 332 I.C.C. 11 (1967).

COMMISSIONER BUSH, concurring in part:

At least one objective of the interim report appears to be to implement the Congressional policy as declared in amended sec-337 I.C.C.

tion 1(14)(a) in an expeditious manner. I do not believe, however, that we can legally establish incentive per diem charges until a hearing has been held as contemplated by the statute.

APPENDIX A

The railroad freight car study

Generally speaking, the only time there is a demand for freight equipment is when a car order is issued by a shipper to a railroad. Traditionally, a station receives the order for cars from a shipper with the specification of how many cars and what type are to be spotted on the shipper's siding, interchange track, or team track. If sufficient suitable cars to meet the shipper's demands on a particular day are on hand or received at the station during the same day, the car supply obviously is adequate. Therefore, information as to car demand and car supply at the station level is a logical starting point for determining the adequacy of car supply.

In the notice of proposed rulemaking entered in the proceeding on December 15, 1967, all common carriers by railroad subject to the act were required to participate in a study of car demand and supply conditions throughout the country. The study commenced January 29, 1968, was designed to develop car supply and performance information at the station level. Since class II line-haul railroads have few stations, information was reported for that class by railroad rather than by station. This was also the case with respect to the study of classes I and II switching and terminal companies and electric railways which was commenced July 15, 1968.

Selection of geographic zones.—The freight car study of the operations of all railroads proceeded on the basis of sampling the stations of 72 class I line-haul railroads and the total operations of 63 class II line-haul railroads.¹ The class I railroads completed a detailed data sheet for 2,641 sample stations. Each railroad reported data over an 11-month period extending from January 29, 1968, to December 31, 1968, plus a few days in January of 1969. The 135 railroads participating in the study filed a total of 32,420 reports during the course of the study year.

The class I railroad stations and the class II railroads were selected in each of six geographic areas or zones covering the continental United States. All data were then aggregated for each of the six zones. The six zones comprised the historical ratemaking territories with the following adjustments:

¹The data for switching and terminal roads are omitted from the data in this report. The switching and terminal data indicate that the omission would not affect our conclusion. For example, in the last six periods of the study, the switching and terminal carriers received only 3 percent of all orders for boxcars in the study and had a comparable percent of the available cars on the study days.

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Zone	Rate territory (as adjusted)
1	New England.
2	Official (including all of Illinois, Michigan, and Virginia).
3	Southern (excluding southern Virginia and eastern Louisiana).
4	Western trunkline (including Montana, Wyoming, western Colorado, southern Missouri; excluding the Upper Peninsula of Michigan).
5	Southwestern (including New Mexico, and all of Louisiana; excluding southern Missouri).
6	Mountain Pacific (excluding Montana, Wyoming, western Colorado, New Mexico).

The resulting zones included the following States:

Zone 1	Zone 2	Zone 3
<i>New England</i>	<i>Great Lakes and Mid-Atlantic</i>	<i>South</i>
Connecticut	Delaware	Alabama
Maine	District of Columbia	Florida
Massachusetts	Illinois	Georgia
New Hampshire	Indiana	Kentucky
Rhode Island	Maryland	Mississippi
Vermont	Michigan	North Carolina
	New Jersey	South Carolina
	New York	Tennessee
	Ohio	
	Pennsylvania	
	Virginia	
	West Virginia	
Zone 4	Zone 5	Zone 6
<i>Midwest</i>	<i>Southwest</i>	<i>Pacific</i>
Colorado	Arkansas	Arizona
Iowa	Louisiana	California
Kansas	New Mexico	Idaho
Minnesota	Oklahoma	Nevada
Missouri	Texas	Oregon
Montana		Utah
Nebraska		Washington
North Dakota		
South Dakota		
Wisconsin		
Wyoming		

Sampling of stations.—Probability sampling techniques were used to select the stations to be studied. Study stations were chosen on the basis of volume of traffic, and only the larger class II roads were selected. A list of stations was prepared from the list of freight stations having employees, which was submitted to the Commission by the railroads in 1965 for use in the station study. This list was then checked against the freight station Accounting Code

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Directory which is published by the Association of American Railroads (AAR). The accounting numbers on the railroads list were checked against the station numbers as shown in the directory. Those numbers in the directory, which were not on the railroads list, were then compared with Leland's Open and Pre-pay Station List, I.C.C. No. A-47, to determine whether the station was an open station or a prepay station. Any stations appearing in Leland's, which were not on the railroad list, were added to the railroad list.

The list of agency stations was then checked against the 1-percent waybill records to determine the volume of originations at each station for the year 1964. Stations which the waybill sample showed to have originated 60 or more carloads were all chosen as study stations. The balance of the stations were sampled at the following rate:

Zone 1 -----	New England -----	1/1
Zone 2 -----	Great Lakes-Mid-Atlantic -----	1/10
Zone 3 -----	South -----	1/4
Zone 4 -----	Midwest -----	1/10
Zone 5 -----	Southwest -----	1/1
Zone 6 -----	Pacific -----	1/1

The frame from which class II railroads were chosen, based on volume of traffic, was sampled at the rate of 1/4 in all 6 zones.

Many prepay stations in the United States originate traffic. These stations come under the jurisdiction of an agent who handles car orders and supplies cars to shippers that use these stations. Therefore, each study station was also required to report the business of the prepay stations coming under its jurisdiction.

Sampling of study days.—The time universe for the study was 12 four-week periods, or 288 days, commencing January 29, 1968. The time universe comprised a working day frame of 48 days for each day of the week, Monday through Saturday, giving a total of 48 times 6 or 288 days. Sundays and holidays were excluded because normally no car orders are received on those days. From the balance of the days in the study period, 12 days were selected for each railroad so that each Monday through Saturday, inclusive, was represented twice. Thus, each station would report for two Mondays, two Tuesdays, et cetera, throughout the 288-day period. In this way the demand and supply characteristics were sampled by days of the week.

A different set of random days was selected for each railroad. Although this method resulted in a variety of study days for stations encompassed in a region, it was done to discover the effect of any distinct operating practices of individual railroads on supply and demand.

Cars in restricted service.—Shipper-owned or shipper-leased cars were excluded from the study except when such cars were made available for general use. Government-owned cars and cars of Canadian or Mexican ownership were also excluded from the study unless, in the case of Government-owned cars, they were released for general service. In the case of Canadian and Mexican cars, if they could be legally loaded and moved, only then were they considered part of the fleet to satisfy shipper demands. The study primarily encompassed only the demand and supply for cars of which the railroads had control.

Railroad cars owned or leased by a carrier, which are assigned to particular shippers, and cars subject to special disposition orders were excluded from the study. For example, if an assigned car were located at a termination point and this point were a study point, the car was not considered a part of the available supply at that point, because the car was under specific orders to be returned to the shipper empty; however, if that car were located at the origination point, it was counted.

Design of sample.—To obtain car supply data (i.e., the cars physically on hand at the study stations on the study day), the reporting railroads were required to record the number of cars on hand, by type of car, at the beginning of a study day and those received during the day. By removing the unserviceable and unsuitable cars from the cars on hand and received, the number of "available cars" was determined, representing serviceable cars which the railroads had on hand to meet shipper orders. The railroads reported car orders on two basis, those outstanding for placement on the study day (whether ordered on or prior to the study day), and those received on the study day irrespective of the day on which the shipper desired placement.

Due to the holidays, there was an uneven number of reporting days in some of the 4-week time periods. The sample was designed to compensate for these holidays by the substitution of comparable days, e.g., a Monday for a Monday, a Tuesday for a Tuesday. In addition, comparable substitutions of days were made to avoid having any one carrier report on consecutive days less than 2 weeks apart. As a result of these substitutions, the time periods diverged somewhat from the calendar months. Accordingly, we have compared selective data with and without the substitutions of days. Since the differences between the two sets of data are not important, our analysis will be based upon the periods approximating calendar months.

The primary objectives of the study were to develop data relating to the supply and demand conditions of the railroads in the United States and their performance in satisfying such demand. Voluminous data were thus compiled by the railroads under continual audit and guidance by our staff in a manageable and useful form, and in accordance with sound statistical practice.

The orders received from shippers, which are reflected in the study, appear to be bona fide, and untainted by any material amount of overordering. In this connection, our service agents audited 73.6 percent of the class I stations in the study.² Each service agent performing an audit completed a detailed questionnaire which included the question, "Is there any duplication or inflation in the car orders reported in line No. 1?", and a like question regarding the orders in line No. 5 of the data sheet. The service agents responded:

	Line No. 1 orders			Line No. 5 orders		
	Respond- ing "No"	Respond- ing "Yes"	Not re- sponding	Respond- ing "No"	Respond- ing "Yes"	Not re- sponding
Number -----	1,752	70	91	1,751	52	110
Percent of total -----	91.7	3.5	4.7	91.7	2.7	5.7

²There were 1,943 audits performed at the study stations of the class I railroads. A total of 2,641 stations participated in the study.

Our service agents found no evidence of overordering in 91.7 percent of the audits, and affirmative evidence of overordering in only 3.5 percent of the audits.

During the study year, moreover, the carriers reported an estimated total of 23,403,430 orders for the placement of cars on the day ordered or subsequent thereto and in fact placed 23,198,136 cars (or 99.1 percent) against these orders. For plain boxcars, the comparable percentage is 98.7 percent.³ This indicates, in our present opinion, that the data are substantially free of any overstatement of demand.

RESULTS OF THE FREIGHT CAR STUDY

On May 13, 1969, this Commission transmitted to Congress certain data from the 1968 freight car study grouped into two time periods each containing a study period. In the answers to questions from Senator Hartke, this Commission advised the Congress that the study was being further refined and evaluated.⁴ The present report is based on that further evaluation of the freight car study.

We limit our discussion to plain boxcars. The problems in other areas may well be as severe, but their magnitude is not. The size of the national freight fleet vis-a-vis other types of freight cars persuades us that boxcars require our separate attention. Our study of other types of cars continues.

Definitions.—For convenience of discussion in this portion of the report, we use the word "shortages" to represent the difference between the shippers' orders for cars and the carriers' physical supply of cars, where the supply is insufficient to meet the orders at the point where the cars are to be used. A "shortage" for a particular station technically and precisely in the study is:

- (a) outstanding or unfilled orders for the placement of cars on or before the study day as of the start of such day;
- + (b) orders filed during the study day for placement of cars on that day, including cars appropriated by shippers;
- (c) cancellations received during the study day of orders set forth in (a) and (b) above;
- (d) cars available at the station in question.

"Cars available" consists of serviceable and suitable empty cars on hand at the start of the study day plus serviceable and suitable empty cars received during the study day. A "surplus" would exist at a particular station if the cars available were more than sufficient to meet the orders at that station.

The shortage and surplus statistics for each station were then collected for all sample stations within each zone for each of the 12 periods. Thus, if only three stations reported a shortage for a period—for example, one reported a shortage of 75 cars; another, of 50 cars; and the third, of 25 cars—the reported shortage for these stations would be 150 cars. Other stations might also

³ There were 5,545,056 orders and 5,474,328 placements of plain boxcars in the study year.

⁴ See "Review of I.C.C. Policies and Practices," Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess., Serial No. 91-16, pages 105, 107, 228 (1969).

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same time experience a surplus of available cars. To obtain separate estimates of shortages and surpluses for the region, an expansion factor, as determined by the sampling ratios, was applied to individual station data.

A third statistic, a "deficiency" in filling orders, represents the difference between shipper orders for placement of cars on the study day and the actual placements in fulfillment of such orders for a particular day. In terms of the above definition of shortage, a deficiency is defined as (a) + (b) - (c) minus placements (not in excess of orders)⁵ of cars during the study day. This particular statistic represents the failures of performance in meeting shipper demand for cars. It relies on back orders and on orders calling for delivery of cars on the study day; the placements are the cars that were placed on the study day less advance placements in anticipation of orders or in excess of shippers' indicated needs.⁶ The deficiency figure for a period is based on the total of all such deficiencies reported by sample stations within a zone expanded at the sampling rates.

Role of improved utilization.—In the analysis and study of the 1968 data, initial consideration was accorded the possibility of greater utilization of the existing car fleet. A brief description of the progress achieved in this area in the 1960's was set forth in our prior report (332 I.C.C. at 16). The 1968 study data place in better perspective the role of improved utilization of cars to meet deficiencies in the fulfillment of shippers' orders.

In 1968, there was considerable fluctuation in the deficiencies in filling current orders for boxcars. In zone 2, the Great Lakes-Mid-Atlantic zone, deficiencies in filling current orders for plain boxcars in any 4-week period of 1968 ranged from an average daily low of 924 to a high of 4,222 cars, and in zone 4 (the Midwest), from 898 to 6,265 cars. Deficiencies in filling orders of shippers in these two zones for plain boxcars in each of the 4-week periods were as follows:

Line No.	Time periods-1968 ⁷	Zone 2 Great Lakes-Mid-Atlantic	Zone 4 Midwest
1	January 29 to February 24 -----	2,972	3,393
2	February 26 to March 23 -----	1,785	1,892
3	March 25 to April 20 -----	1,864	1,287
4	April 22 to May 18 -----	1,574	1,012
5	May 20 to June 15 -----	924	1,317
6	June 17 to July 13 -----	1,829	1,847
7	July 15 to August 10 -----	1,563	1,070
8	August 12 to September 7 -----	1,507	898
9	September 9 to October 5 -----	2,322	2,878
10	October 7 to November 2 -----	4,222	3,606
11	November 4 to 30 -----	3,114	6,265
12	December 2 to 30, and January 2, 8, 9, 16, and 23, 1969 -----	1,020	2,989

⁵The orders relied on were for placement on or before the study day. Placements in excess of reported orders were eliminated, since they were made for placement of orders subsequent to the study day.

⁶Deficiencies and "total placements" are shown in appendix C. The total placement figures shown in appendix C are prior to the deduction of early placements.

⁷The last time period was adjusted in the compilation of the data to make up for the exclusion of the six holidays in the other time periods.

A similar pattern existed throughout the year in the two zones: high deficiencies in the first two or three periods, much smaller deficiencies in the spring and summer months, and again high deficiencies in the fall and early winter (the last four periods).⁸

Appendix C sets forth the study data relating to deficiencies and to total placements. In many months during the fall and winter, the placements were at such a sufficiently high level that, if they had been sustained throughout the year, they would have entirely eliminated the smaller deficiencies of certain other months. For example, the carriers in zone 4 placed 112,632 cars in the ninth period; if they had placed 112,000 cars in each of the study periods, they would have removed all their deficiencies in placements in the third period and nearly all in two other periods (Nos. 4 and 5).

According to appendix C, in the Great Lakes-Mid-Atlantic zone during the second 4-week period of the study (February 26 to March 23), the total placements were 163,608 plain boxcars. In the fourth period, April 22 to May 11, only 125,568 cars were placed in that zone, while there were 37,776 deficiencies in filling orders. If the railroads in that zone had placed 163,608 plain boxcars in the latter period, as they in fact did in the former period, it seems reasonable to conclude that they would have entirely eliminated the 37,776 deficiencies in the latter period. The fewer placements between April 22 and May 18 seem not to have been affected by a lack of plain boxcars, because in that period they had a surplus of more than 14,000 cars greater than the surplus in the earlier period.⁹

The carriers in the Midwest placed their maximum number of cars in September and the carriers in the Great Lakes-Mid-Atlantic zone, in March. Although placements at the maximum monthly rate would have eliminated most deficiencies in the spring and summer, such performance in the fall and winter months would still have left deficiencies ranging from 40,320 to 67,704 cars, excepting the 12th time period, in the Great Lakes-Mid-Atlantic zone and from 32,376 to the enormous deficiency of 135,480 cars in the Midwest.

The data suggest that the maintenance of even the maximum level of performance in placing the existing fleet of cars throughout the year would eliminate certain lesser deficiencies in certain periods, but would not entirely eliminate all deficiencies. Even as a goal for which the carriers might strive, the maximum level of annual performance does not fully meet shipper requirements. A high level of deficiencies would even then continue to exist for at least half the year. Other data even more strongly suggest the limitations that exist on the attainment of large improvements in car utilization to meet the high levels of deficiencies in the fall and winter months.

Effect of inadequate car supply.—Like the data set forth in the CS-44 reports of the railroads to AAR, the 1968 study data revealed both a failure of the carriers at many study stations to fill the shipper demand for plain boxcars, and yet, at the same time, large surpluses of boxcars. As a consequence, the data have been analyzed to determine whether the surpluses could have been used to meet the unfilled orders.

In appendix D, page 3, the shortages of available cars and the deficiencies in placements are shown for each zone for each of the 12 four-week periods in 1968. Immediately thereafter, on the same page, the ratios of shortages

⁸Only limited data were available for the month of January in the study.

⁹The surplus in zone 3 from April 22 to May 18 was 589,824 cars; the surplus from February 26 to March 23 was only 575,352 cars.

INCENTIVE PER DIEM C

to deficiencies are shown. The chart set graph of these ratios. The ratios provide indication as a factor in the failure to fill orders, and to place cars was likely due to the failure where they were needed.

It is axiomatic that a carrier can only make Even when cars are available, however, deficiencies at deficiency stations have been deficiencies, as those terms are here defined. If the ratio is less than 100 percent, the deficiency is a surplus. A 100-percent ratio, then, indicates maximum use of cars available at these stations. The distribution of cars from surplus stations or deficiencies. Generally, the ratios of shortfalls in the periods of peak demand on the cars were filled. This is demonstrated in appendix D.

In the last four time periods, the ratios of placements in the Midwest were 74 percent, 79 percent, respectively, and in the Great Lakes 89 percent, 80 percent, and 62 percent. Despite the difficulties in meeting orders, they were also in the Great Lakes-Mid-Atlantic zones. In the same carriers experienced large surpluses in the prior report. The next step in the analysis was to determine what extent the carriers could be expected to place.

The table and chart in appendix D, pages 2 and 3, show the ratio of placements to the surpluses for each period. This ratio indicates the control over surpluses that would be required for a week period to have filled all orders on a 100 percent basis. Appendix D, pages 2 and 3, means that the ratio existed could have met all orders on the placements as reported, they had also a surplus of available cars where they were needed.

According to the statistics of appendix D, the surplus was large enough in the Midwest to permit the elimination of most deficiencies by utilization of cars in that region. However, by the 11th time period, the carriers were called upon by their shippers to place cars of the regional surplus where it was needed above the cars actually placed.

In the 11th period, the deficiencies in filling orders reached their peak for the year of 150,360 cars. Throughout the Midwest at the time fell to the carriers could have kept up with the demand only through maintaining control and routing cars scattered throughout the Midwest. At the same time in the Atlantic zone the deficiencies in filling orders were within the region. Furthermore, in October

forth in appendix D, page 1, is a
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indicate to what extent the failure
have a sufficient supply of cars

placements from cars available.
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placed, the ratio of shortages to
, will be 100 percent. When the
y station may or may not have a
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augmented car fleet can reduce
es to deficiencies are quite high
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ereto.

s of shortages to deficiencies in
, 84 percent, 84 percent, and 68
-Mid-Atlantic zone, 63 percent,
ing the period when the Midwest
ere experiencing their greatest
experiencing the greatest prob-
s. To be sure, at other stations
es, a fact we also noted in our
therefore, was to determine to
o better utilize these large sur-

and 3, relate the deficiencies in
n each zone. These ratios dem-
d have been necessary in any 4-
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a current basis if, in addition to
placed 10 percent of the regional
led in the region.

ages 2 and 3, the surplus of cars
he spring and summer to permit
of 5 to 10 percent of the surplus
eriod, carriers operating in that
lace the equivalent of 40 percent
throughout the Midwest over and

ng orders in the Midwest rose to
surplus of cars at other stations
e yearly low 305,016. Thus, the
the flow of loading requirements
40 percent of the surplus cars
e time, in the Great Lakes-Mid-
s were 21 percent of the surplus
when the latter zone experienced

its greatest deficiencies (101,328 cars), the deficiencies were 28 percent of the surplus. In both the foregoing zones the ratio of deficiencies to surplus cars ranged between only 5 and 10 percent in the spring and summer months.

Even if it is assumed that all surplus in zone 4 belongs to one carrier, it would be difficult enough for that carrier to control and route 40 percent of all the surplus cars scattered over the entire Midwest region; the problem is further complicated by the fact that the scattered surplus is on line of numerous competing railroads. For example, in appendix E we have set forth for three competing railroads¹⁰ the amounts of their individual surpluses on line in the Midwest during the study year, and the percent of their individual Midwest surpluses to the total Midwest regional surplus in each of the 12 periods. In heavy-loading periods, these railroads had only a small fraction of the Midwest surplus cars on their individual lines.

It seems apparent from the foregoing ratios and charts that the shift of a substantial portion of the car supply in those periods from other zones to the Midwest would have reduced the already diminished supply of cars available for relieving deficiencies in placements in other zones. It is true that the utilization of less than 10 percent of the surplus in the spring and summer would eliminate most deficiencies. But in the fall and winter months, even if the use of surpluses were redoubled in an effort to meet the demand, such utilization would not be sufficient to fill all orders. For example, in the Great Lakes-Mid-Atlantic zone, in the spring and summer of 1968, deficiencies ranged from 5 percent to 9 percent of surpluses, while in October and November they rose to 28 percent and 21 percent, respectively. In the Pacific zone, the spring and summer ratios were between 4 percent and 8 percent, and in November and December, deficiencies were 18 percent of surpluses. In the South the ratio rose to a peak of 22 percent in October and in the Southwest to a peak of 15 percent in February. In view of the concurrence of shortages of cars throughout most zones of the country, it appears that the return of cars to owning lines in such periods, although probably effective in some areas, would not provide a complete solution for the fall and winter deficiencies. Even if the regional imbalance were eliminated, there would still be substantial shortages which probably can only be relieved by an increase in the national fleet to meet demands of shippers who in 1968 ordered plain boxcars. The statistics show that the performance in filling orders in all zones in the fall and winter months was affected by a shortage of boxcars.

¹⁰Where the railroad was located in more than one zone, we have counted the surplus cars located on portions of the line within the Midwest zone.

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APPENDIX B—Continued

7 Computation of the incentive charge per \$1,000 of net investment at 6 percent per annum of net investment

Line No.	Year of life (1)	Net investment per \$1,000 (2)	Incentive (col. 2x6 percent) (3)	Group A 0-5 years (4)	Group B 6-10 years (5)	Group C 11-15 years (6)	Group D 16-20 years (7)	Group E 21-25 years (8)	Group F 26-30 years (9)	Group G over 30 years (10)
1---	1st	\$985.00	\$59.10	\$59.10						
2---	2d	935.00	57.30	57.30						
3---	3d	925.00	55.50	55.50						
4---	4th	895.00	53.70	53.70						
5---	5th	865.00	51.90	51.90						
6---	6th	835.00	50.10		\$50.10					
7---	7th	805.00	48.30		48.30					
8---	8th	775.00	46.50		46.50					
9---	9th	745.00	44.70		44.70					
10---	10th	715.00	42.90		42.90					
11---	11th	685.00	41.10			\$41.10				
12---	12th	655.00	39.30			39.30				
13---	13th	625.00	37.50			37.50				
14---	14th	595.00	35.70			35.70				
15---	15th	565.00	33.90			33.90				
16---	16th	535.00	32.10				\$32.10			
17---	17th	505.00	30.30				30.30			
18---	18th	475.00	28.50				28.50			
19---	19th	445.00	26.70				26.70			
20---	20th	415.00	24.90				24.90			
21---	21st	385.00	23.10					\$23.10		
22---	22d	355.00	21.30					21.30		
23---	23d	325.00	19.50					19.50		
24---	24th	295.00	17.70					17.70		
25---	25th	265.00	15.90					15.90		
26---	26th	235.00	14.10						\$14.10	
27---	27th	205.00	12.30						12.30	
28---	28th	175.00	10.50						10.50	
29---	29th	145.00	8.70						8.70	
30---	30th	115.00	6.90						6.90	
31---	31st	100.00	6.00							\$6.00
32---	Total	16,000.00								
33---	Per year	-----	986.00							
34---	Per day, collectible in 6 months (line 33 divided by 171 days)	-----	5.76							
				32.44	27.19	21.94	16.67	11.00	6.14	3.12

This table assumes a net life of 30 years and an annual depreciation rate of 3 percent with 10 percent salvage value. Net investment is shown at midyear.

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See Partia No. 258 (Sub-No. 1) Incentive Per Diem Charges-1968, deficiencies in placements and total placements, Incentive-general services (unpublished), for 16 four-week periods-January 19, 1968, to January 22, 1969, inclusive

Line No.	Item (1)	Time period											
		No. 1 (2)	No. 2 (3)	No. 3 (4)	No. 4 (5)	No. 5 (6)	No. 6 (7)	No. 7 (8)	No. 8 (9)	No. 9 (10)	No. 10 (11)	No. 11 (12)	No. 13 (13)
United States total													
1	Deficiencies in placements-	251,562	156,432	144,504	121,128	115,032	135,240	112,008	107,408	172,796	260,344	306,840	170,304
2	Total placements-	499,778	459,152	428,016	426,656	429,448	436,512	435,840	428,308	471,860	441,500	485,744	428,304
Zone 1-New England													
3	Deficiencies in placements-	-	-	-	-	-	-	-	-	-	-	-	-
4	Total placements-	-	-	-	-	-	-	-	-	-	-	-	-
Zone 2-Great Lakes-Mid-Atlantic													
5	Deficiencies in placements-	71,328	82,752	45,216	37,776	22,176	53,808	17,512	36,168	55,728	101,320	74,720	29,424
6	Total placements-	136,320	163,608	135,568	135,568	159,136	155,712	136,216	137,504	148,200	179,040	118,048	138,816
Zone 3-South													
7	Deficiencies in placements-	38,912	37,056	31,344	25,800	35,088	20,464	29,816	29,048	25,512	38,256	34,224	24,120
8	Total placements-	117,744	113,320	97,040	97,264	79,048	75,200	73,464	67,896	67,384	51,992	108,144	94,408
Zone 4-Midwest													
9	Deficiencies in placements-	81,432	45,408	30,888	29,248	31,608	44,328	25,680	21,552	69,072	86,544	150,360	71,736
10	Total placements-	111,696	95,600	79,368	97,456	86,736	104,112	95,816	81,024	117,632	107,804	97,752	86,048
Zone 5-Southwest													
11	Deficiencies in placements-	27,072	7,272	13,008	8,160	7,128	8,376	10,456	10,560	-	10,584	12,660	12,600
12	Total placements-	60,888	55,816	53,808	44,240	42,504	41,184	36,024	45,288	48,368	46,176	49,440	49,400
Zone 6-Pacific													
13	Deficiencies in placements-	32,400	20,256	23,328	22,800	18,312	17,280	11,952	14,784	16,728	23,784	24,264	30,472
14	Total placements-	84,176	57,560	67,808	63,960	60,240	59,112	67,232	62,088	62,352	56,232	81,024	57,472

Deficiencies in placements—total orders, line 1 minus line 6 of the data sheet minus early place as reported in part II of the data sheet.

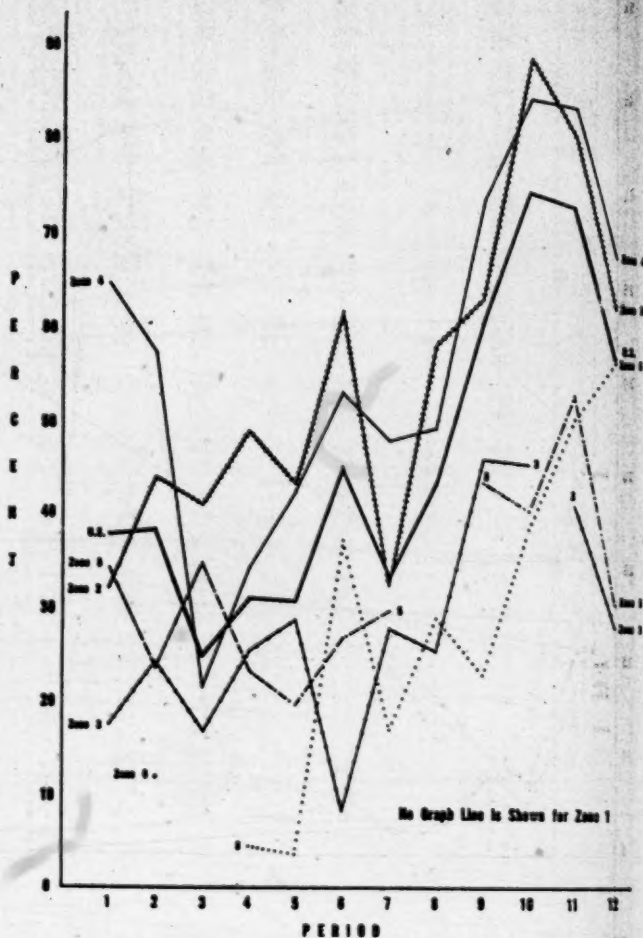
1. Deficiencies in placements-total orders, line 1 minus line 6 of the data sheet minus placements, line 4 of the data sheet minus early placements as reported in part II of the data sheet.

2. Total placements-line 4 of the data sheet.

Although not suppressed, the estimate based on data with substitutions of days indicates high variability.

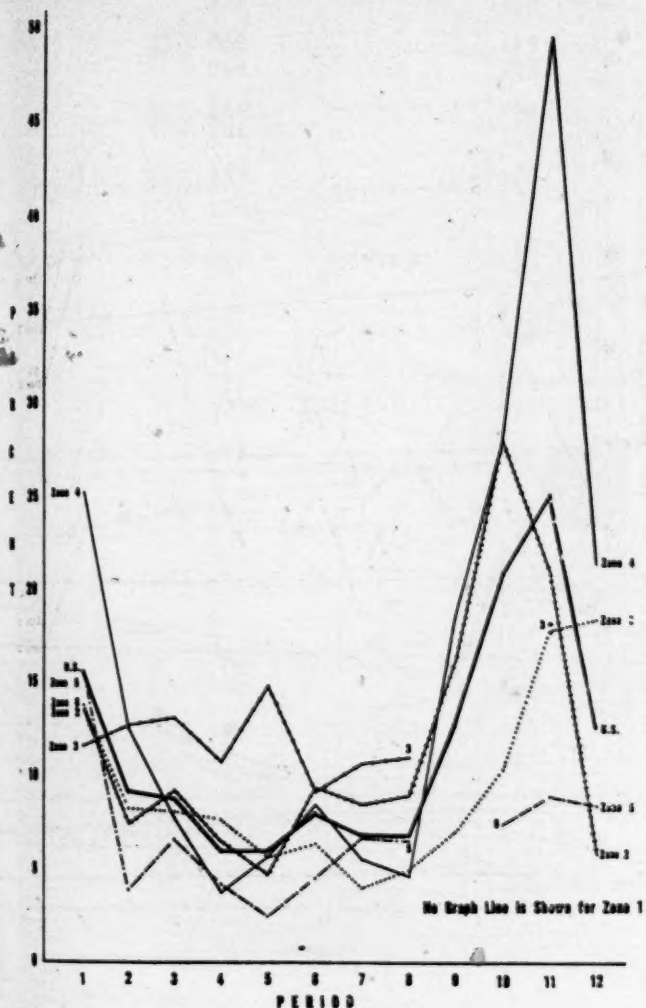
APPENDIX D

Percent of car shortages to deficiencies in placements buscar-general service (unequipped) 12 four-week periods, January 29, 1968 to January 23, 1969, inclusive



APPENDIX D-Continued

Percent of deficiencies in placements to surpluses boxcar-general service (unequipped) 12 four-week periods, January 29, 1968 to January 23, 1969, inclusive



INTERSTATE COMMERCE COMMISSION REPORTS

APPENDIX B—Continued

By Part No. 322 (Sub-No. 1) Inventions For Ocean Cables—1888, shortages and surpluses related to deficiencies in placements, houses—general service (un-equipped), for the 12 four-week periods January 22, 1888, to January 22, 1889, inclusive

Line No.	Item (1)	Time period											
		Mo. 1 (2)	Mo. 2 (3)	Mo. 3 (4)	Mo. 4 (5)	Mo. 5 (6)	Mo. 6 (7)	Mo. 7 (8)	Mo. 8 (9)	Mo. 9 (10)	Mo. 10 (11)	Mo. 11 (12)	Mo. 12 (13)
United States total													
1	Shortages-----	95,208	59,808	36,024	37,512	35,280	60,812	37,248	46,728	104,280	193,992	223,944	97,128
2	Deficiencies in placements-----	251,592	156,432	144,504	121,128	115,032	135,240	112,008	107,828	172,288	280,544	306,840	176,304
3	Surpluses-----	1,628,424	1,712,184	1,661,184	2,022,480	1,922,016	1,717,656	1,669,304	1,582,104	1,341,480	1,251,912	1,227,072	1,351,368
4	Percent shortages to deficiencies-----	37.6	38.2	24.9	31.0	30.7	45.0	33.3	43.3	60.5	74.5	73.0	57.0
5	Percent deficiencies to surpluses-----	15.5	9.1	8.7	6.0	6.0	7.9	6.8	6.8	12.8	20.8	25.0	13.6
Zone 1—New England													
6	Shortages-----	•	•	•	•	•	•	•	•	•	•	•	•
7	Deficiencies in placements-----	•	•	•	•	•	•	•	•	•	•	•	•
8	Surpluses-----	•	•	•	•	•	•	•	•	•	•	•	•
9	Percent shortages to deficiencies-----	•	•	•	•	•	•	•	•	•	•	•	•
10	Percent deficiencies to surpluses-----	•	•	•	•	•	•	•	•	•	•	•	•
Zone 2—Great Lakes—Mid-Atlantic													
11	Shortages-----	22,824	18,768	18,456	16,456	9,576	27,072	12,120	21,024	35,088	69,744	60,120	15,240
12	Deficiencies in placements-----	71,128	42,792	45,216	37,776	22,176	43,896	37,512	36,168	55,728	101,328	74,736	24,480
13	Surpluses-----	534,120	575,352	493,056	586,624	474,480	473,760	467,024	406,104	348,800	361,416	359,304	419,880
14	Percent shortages to deficiencies-----	32.0	43.9	40.8	48.9	43.2	61.7	32.3	58.1	63.0	68.6	80.4	52.344
15	Percent deficiencies to surpluses-----	13.4	7.4	9.2	6.4	4.7	9.3	6.6	8.9	16.1	28.0	20.8	5.844
Zone 3—South													
16	Shortages-----	6,432	8,928	5,208	6,504	10,032	1,704	6,864	6,072	•	•	14,016	8,784
17	Deficiencies in placements-----	36,812	37,056	31,344	25,800	35,088	20,664	24,816	24,048	25,512	38,756	36,276	24,120
18	Surpluses-----	320,304	294,048	241,056	240,984	238,348	226,704	230,720	230,848	190,844	176,136	186,712	216,528
19	Percent shortages to deficiencies-----	17.4	24.1	16.6	25.2	28.6	8.2	27.7	25.3	48.9	45.6	41.0	28.0
20	Percent deficiencies to surpluses-----	11.5	12.6	13.0	10.7	14.7	9.1	10.6	10.9	•	•	19.9	•

See notes at end of table.

See notes at end of table.

INCENTIVE PER DIEM CHARGES—1968

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See Purse No. 838 (Sub-No. 1) Incentive Per Diem Charges—1968, shortages and surpluses related to deficiencies in placements, bonus—general service (unassigned), for the 12 four-week periods January 22, 1968, to January 22, 1969, continued.

Line No.	Item (1)	No. 1 (2)	No. 2 (3)	No. 3 (4)	No. 4 (5)	No. 5 (6)	No. 6 (7)	No. 7 (8)	No. 8 (9)	No. 9 (10)	No. 10 (11)	No. 11 (12)	No. 12 (13)
Zone 4—Midwest													
21	Shortages-----	52,656	25,968	6,424	6,280	13,416**	23,472	12,288	10,608	50,856	73,056	125,552	48,624
22	Deficiencies in placements-----	81,432	45,408	30,488	24,288	31,608	44,328	25,680	21,352	69,072	86,544	150,360	71,736
23	Surpluses-----	324,288	366,048	398,568	652,440	561,816	525,048	470,520	465,752	373,176	309,744	305,016	337,224
24	Percent shortages to deficiencies-----	64.7	57.2	21.4	34.1	42.4	53.0	47.9	48.2	73.6	84.4	83.5	87.8
25	Percent deficiencies to surpluses-----	25.1	12.4	7.7	3.7	5.6	8.4	5.5	4.6	18.5	27.9	49.3	21.3
Zone 5—Southwest													
26	Shortages-----	9,216	1,704	4,512	1,896	1,392	2,232	3,168	*	*	4,272	6,440	4,848
27	Deficiencies in placements-----	27,024	7,272	13,008	8,160	7,128	8,376	10,656	10,560	*	10,584	12,960	12,600
28	Surpluses-----	175,728	193,608	196,680	198,672	282,576	186,672	159,816	161,880	158,472	162,968	145,400	159,496
29	Percent shortages to deficiencies-----	34.1	23.4	34.7	23.2	19.5	26.6	29.7	*	43.4	40.4	52.8	38.5
30	Percent deficiencies to surpluses-----	15.4	3.8	6.6	4.1	2.5	4.5	6.7	6.5	*	7.4	8.9	8.4
Zone 6—Pacific													
31	Shortages-----	*	2,376	*	960	648	6,432	2,016	4,272	3,792	9,168	17,304	20,040
32	Deficiencies in placements-----	32,400	20,256	23,328	22,800	18,312	17,280	11,952	14,784	16,728	23,784	34,248	35,472
33	Surpluses-----	236,448	267,368	292,848	300,552	325,056	275,136	304,944	301,608	239,784	230,112	194,304	184,232
34	Percent shortages to deficiencies-----	*	11.7	*	4.2	3.5	37.2	16.9	28.9	22.7	38.5	50.3	56.5
35	Percent deficiencies to surpluses-----	13.7	8.2	8.0	7.6	5.6	6.3	3.9	4.9	7.0	10.3	17.7	18.3

1. Shortages and/or surpluses—line 1 minus line 6 of the data sheet, minus the sum of line 2 minus line 7 and line 3 minus line 8 of the data sheet.

Shortages—orders exceed supply as determined by above formula.

Surpluses—supply exceeds orders as determined by above formula.

2. Deficiencies in placements—line 1 minus line 6 of the data sheet minus line 4 of the data sheet.

3. Percentage of shortages to deficiencies in placements—shortages divided by deficiencies in placements.

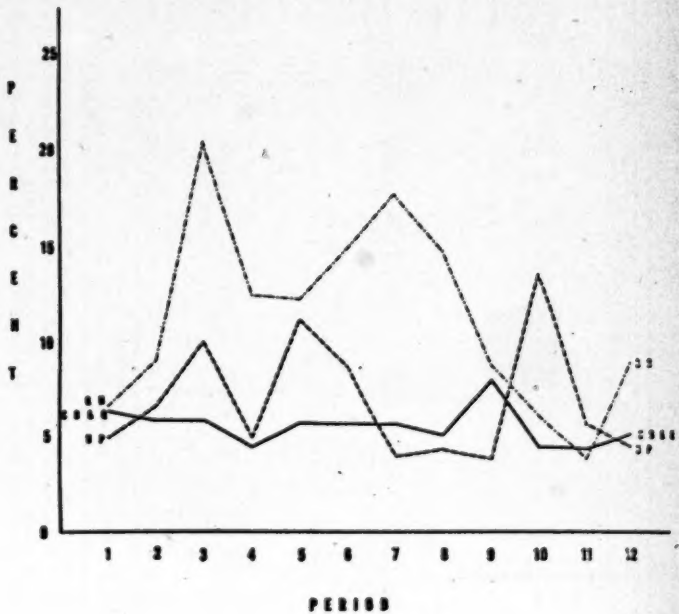
4. Percentage of deficiencies in placements to surplus—deficiencies in placements divided by surpluses.

Although due to high variability in the estimate using the data with substitutions of days.

**Although not suppressed, the estimate based on data with substitutions of days indicates high variability.

APPENDIX E

Boxcar—general service (unequipped) percent of Midwest surplus to total regional surplus—three railroads 12 four-week periods, January 29, 1968 to January 23, 1969, inclusive



INCENTIVE PER DIEM CHARGES-1968

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APPENDIX E-Continued

Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem Charges-1968, percent of Midwest surplus to total regional surplus—three railroads, because—general service (unequipped), for 12 four-week periods—January 29, 1968, to January 25, 1969, inclusive

Line No.	Item (1)	Time period											
		Mo. 1 (2)	Mo. 2 (3)	Mo. 3 (4)	Mo. 4 (5)	Mo. 5 (6)	Mo. 6 (7)	Mo. 7 (8)	Mo. 8 (9)	Mo. 9 (10)	Mo. 10 (11)	Mo. 11 (12)	Mo. 12 (13)
Chicago, Burlington & Quincy													
1	Surplus-----	20,424	21,552	23,352	28,848	32,304	29,856	26,832	23,784	29,520	13,872	13,272	17,352
2	Regional surplus-----	324,268	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
3	Percent of regional surplus-----	6.298	5.888	5.859	4.422	5.750	5.686	5.703	5.106	7.910	4.479	4.351	5.146
Union Pacific													
4	Surplus-----	16,128	24,216	39,840	32,400	62,544	45,384	18,792	20,084	14,160	41,880	17,048	15,048
5	Regional surplus-----	324,868	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
6	Percent of regional surplus-----	4.973	6.616	9.996	4.990	11.132	8.644	3.994	4.308	3.794	13.521	5.602	4.477
Great Northern													
7	Surplus-----	21,312	32,808	81,504	80,976	68,352	78,048	83,328	68,664	32,520	18,816	11,592	29,928
8	Regional surplus-----	324,268	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
9	Percent of regional surplus-----	6.572	8.963	20.449	12.411	12.166	14.865	17.710	14.741	8.714	6.076	3.800	8.975
1. Surplus—sum of line 2 minus line 7 and line 3 minus line 8 of the data sheet minus line 1 minus line 6 of the data sheet.													
2. Percent of regional surplus—surplus divided by regional surplus.													

APPENDIX F

Major creditor roads	General service (equipped and unequipped) boxcars					
	New boxcars purchased or built			Rebuilt boxcars		
	1964-68 average	Years More	Average Less	1964-68 average	Years More	Average Less
Akron, Canton & Youngstown-----	120	2	3	0	0	0
Atchafalaya, Topeka & S.F. Ry-----	376	2	83	400	4	1
Bangor & Aroostook R-----	80	1	4	0	0	0
Chesapeake & Ohio-Chicago, Burl. & Quincy R-----	215	1	4	87	1	1
Denver & Rio Grande Western ---	236	2	3	400	3	1
Great Northern R. Co-----	81	2	3	0	0	0
Louisville & Nashville R-----	350	2	3	60	1	1
Missouri-Kansas-Texas R-----	170	2	3	367	2	3
Northern Pacific Ry-	0	0	0	0	0	0
Pittsburgh & Lake Erie-----	140	2	3	0	0	0
St. Louis Southwestern Ry-----	0	0	0	413	3	1
Seaboard Coast Line R-----	437	3	2	0	0	0
Texas & Pacific Ry-	130	3	2	20	1	1
Union Pacific R----	150	2	3	0	0	0
	2,102	2	103	0	0	0

⁸In one of these years, the A.T.&S.F. purchased or built 300 boxcars.

⁹In one of these years, the NP purchased 136 boxcars.

¹⁰In two of these years, the purchases were 2,031 and 2,040.

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49 CFR Part 1036

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of December 1969.

EX PARTE No. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES-1968

It appearing, That by order of the Commission, dated December 15, 1967, this rulemaking proceeding was instituted for the purpose of implementing those provisions of the law relating to the Commission's authority to encourage the acquisition and maintenance of an adequate car supply as specified in Public Law 89-430, which, effective May 24, 1966, amended section 1(14)(a) of the Interstate Commerce Act:

And it further appearing, That investigation of the matters and things involved in this proceeding has been made and that the Commission has made and filed an interim report herein containing its tentative findings of fact and provisional conclusions thereon, including the proposed rules and regulations set forth in the appendix to this order, which interim report is hereby referred to, and made a part hereof:

It is ordered, That verified statements of facts, briefs, and statements of position respecting the tentative conclusions reached in the said interim report, the rules and regulations proposed in the appendix to this order, and any other pertinent matter, are hereby invited to be submitted pursuant to the filing schedule set forth below by an interested person whether or not such person is already a party to this proceeding.

It is further ordered, That any person not already a party to this proceeding and intending to participate therein for the first time shall notify this Commission, by filing with the Secretary, Interstate Commerce Commission, Washington, D. C. 20423, on or before January 23, 1970, the original and one copy of a statement of his intention to participate; and that this Commission shall then prepare and make available to all such persons a list containing the names and addresses of all parties to these proceedings, upon whom copies of all statements must be served.

It is further ordered, That initial verified statements of facts, briefs, and statements of position in response to the said interim report may be filed on or before February 24, 1970; and that replies thereto may be filed on or before March 24, 1970.

It is further ordered, That any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced.

And it is further ordered, That a copy of this report and order and all appendices be served upon each respondent, all other parties, each public utility commission or board or similar regulatory body of each State, the Secretary of the Department of Transportation, the Association of American Railroads-Car Service Division, and the American Short Line Railroad Association; that a copy be posted in the office of the secretary of this Commission and in each field office; and that a copy of this order and of the appendix hereto be delivered

to the Director, Division of Federal Register, for publication in the Federal Register.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX

Part 1036—Incentive Per Diem Charges on Boxcars

§ 1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads the additional per diem charges set forth in § 1036.3 on all boxcars shown below,

Mechanical Designation

Code Number

XM -----	B100-109, B200-209, B300-309
XMI -----	B110-119, B210-219, B310-319
XMIH -----	B120-129, B220-229, B320-329
VA -----	B040
VM -----	B050
XC -----	B060
XCI -----	B070
XU -----	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Canadian and Mexican owned cars are excepted from the operation of these rules. The rules of this part shall apply to intrastate, interstate, and foreign traffic.

§ 1036.2 *Amount of incentive charge.*—The incentive charges applicable in each cost bracket by age group are set forth below:

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APPENDIX

Amount of incentive per diem on boxcars (collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	\$0-1,000-----	\$0.32	\$0.27	\$0.22	\$0.17	\$0.11	\$0.06	\$0.04
2	1-3,000-----	0.65	0.54	0.44	0.33	0.23	0.12	0.07
3	3-5,000-----	1.30	1.09	0.88	0.67	0.46	0.25	0.14
4	5-7,000-----	1.95	1.63	1.32	1.00	0.68	0.37	0.21
5	7-9,000-----	2.60	2.18	1.75	1.33	0.91	0.49	0.28
6	9-11,000-----	3.25	2.72	2.19	1.67	1.14	0.61	0.35
7	11-13,000-----	3.90	3.26	2.53	2.00	1.37	0.74	0.42
8	13-15,000-----	4.54	3.81	3.07	2.33	1.60	0.86	0.49
9	15-17,000-----	5.19	4.35	3.51	2.67	1.82	0.98	0.56
10	17-19,000-----	5.84	4.89	3.95	3.00	2.05	1.11	0.63
11	19-21,000-----	6.49	5.44	4.39	3.33	2.28	1.23	0.70
12	21-23,000-----	7.14	5.98	4.82	3.67	2.51	1.35	0.77
13	23-25,000-----	7.79	6.53	5.26	4.00	2.74	1.47	0.84
14	25-27,000-----	8.44	7.07	5.70	4.33	2.96	1.60	0.91
15	27-29,000-----	9.09	7.61	6.14	4.67	3.19	1.72	0.98
16	29-31,000-----	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	31-33,000-----	10.39	8.70	7.02	5.33	3.65	1.96	1.12
18	33-35,000-----	11.04	9.24	7.46	5.67	3.88	2.09	1.19
19	35-37,000-----	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	37-39,000-----	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	39-41,000-----	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§ 1036.3 *Earmarking.*—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in §1036.1 for addition to each carrier's fleet in accordance with this part.

§1036.4 *Use of funds.*—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase in whole or in part new unequipped boxcars for general service described in paragraph 1, provided the carrier has in the same calendar year already built or purchased its 1964-1968 average number of such boxcars. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, provided the carrier has in the same calendar year already rebuilt its 1964-1968 average number of such boxcars.

§1036.5 *Effective date.*—The rules set forth in this part shall be effective from September 1 of each year through February 28 of the following year.

§1036.6 *Rules and regulations suspended.*—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day foreign cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 34 Stat. 379, 383, as amended, 49 U.S.C. 1, 12.)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided April 28, 1970

Upon consideration of verified statements, briefs, and statements of position filed in response to the order accompanying the interim report herein, decided December 12, 1969, the provisional conclusions and rules and regulations embodying those conclusions set forth in that report and order, modified. Rules and regulations governing incentive per diem charges promulgated pursuant to section 1(14)(a) of the Interstate Commerce Act.

Appearances as shown in Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11, and in the interim report herein, and in addition:

J. H. Anderson, Martin L. Cassell, Richard G. Clemens, Clifford T. Coomes, Fred Diegtel, Richard J. Flynn, R. Guregian, C. D. Haig, Jr., Alfred W. Heese, Jr., John P. Higinbotham, James W. Hoeland, G. T. Honea, Richard A. Hollander, Albert W. Laisy, J. H. McGlothlin, George P. Mueller, Byron D. Olsen, B. David Sigman, Walter G. Treanor, T. M. von Sprecken, Jr., and Sidney Weinberg for respondents.

John M. Agrey, C. W. Bath, Walter F. Cornick, J. P. Deehan, C. R. Ellenwood, Jr., Roger Fleming, Howard Gould, Donald E. Graham, Donald A. Haakenson, Jon C. Hansen, Glen Hofer, Gus R. Hubbard, Neal A. Jackson, John H. King, Dwight L. Koerber, Horace S. Libby, Frank E. Polom, David Reichert, Dudley J. Russell, F. L. Sigloh, Oliver L. Stewart, Stephen Strauss, and Henry J. Yuncck for shippers.

REPORT OF THE COMMISSION

BY THE COMMISSION:

In our interim report in this proceeding, 337 I.C.C. 183, of December 12, 1969, we set forth tentative conclusions regarding 337 I.C.C.

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the adequacy of the national freight car supply, and announced a provisional judgment with respect to the form and amount of an incentive per diem charge which will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense, in accordance with the provisions of section 1(14)(a) of the Interstate Commerce Act.¹ That report and appendixes, together with the accompanying order, were served on each party, each State public utility body, the Secretary of the Department of Transportation, the Association of American Railroads—Car Service Division, and the American Short Line Railroad Association. The order and its appendix were also published in the Federal Register of December 31, 1969 (34 F.R. 20438). We invited all interested parties to submit verified statements of facts, briefs, and statements of position respecting those tentative conclusions and the proposed rules and regulations contained in the appendix to the order, and any other pertinent matter. The rules and regulations therein proposed, which provide incentive per diem charges on unequipped boxcars, are reproduced in appendix A to this report.

The background leading to the institution of this proceeding is described in the interim report. We there stated the demand

¹Section 1(14)(a) provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

for unequipped boxcars cannot be satisfied for at least half the calendar year, and tentatively concluded that an incentive increment added to the basic per diem charge during the fall and winter months, that is, from September through February, would tend to speed the use and return of those cars to their owners, or in the alternative provide a fund to augment the national boxcar fleet. In order to alleviate doubt that the incentive charge would have the desired effect on car supply, we proposed that funds derived from the incentive charge should be "earmarked" and used to purchase or build new unequipped boxcars for general service or to rebuild boxcars. The appendix to the interim order set forth a table of incentive charges proposed to be applied to the boxcars specified in the accompanying rules, depending upon the cost and age of the cars.

PROCEDURAL MATTERS

Certain of the verified statements which were received and various motions include requests for oral hearing.² The statements and motions refer to the words "after hearing" in section 1(14)(a), empowering us to establish incentive per diem, and to certain sections of the Administrative Procedure Act, as requiring an oral hearing. This is a rulemaking proceeding as defined in section 551 of the latter act. This agency's interim report and order, with attached appendixes, as noted, were served on each party, and the order and its appendix were published in the Federal Register, in compliance with section 553(b) of that act. No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that act. Cf. *American Trucking Assn. v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397 (1967).

It must also be understood, as we announced in our interim report, that this is an "open-end" proceeding. Our studies regarding freight car shortage are continuing studies; and we

²Those filed by the Penn Central Transportation Company, the Seaboard Coast Line Railroad Company (also on behalf of the Georgia Railroad, the Western Railway of Alabama, the Atlanta and West Point Railroad, and the Chattahoochee Valley Railway Company), the Boston and Maine Corporation, and the Florida East Coast Railway Company; some also request oral argument. The Long Island Rail Road Company filed a separate motion to modify the order accompanying the interim report to provide for an oral hearing, opportunity for cross-examination and presentation of rebuttal evidence, and for the filing of briefs.

will expect the parties to bring to our attention any evidence of circumstances requiring modification of the rules we adopt herein as experience is gained under the new regulations. The Secretary of Agriculture, for example, in a thoughtful statement suggests the holding of hearings after the promulgation of the incentive plan; as the suggested action would be premature at this early date, no such hearings will now be scheduled. Hearings or further proceedings may be necessary later as experience is gained under the incentive plan. In the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern, the requests for oral hearing, cross-examination, and argument are hereby denied. They too may be renewed at a later date as experience is obtained with the incentive charges.

We have carefully reviewed the statements and replies of the parties. For the most part, even when critical of the interim report, they do not raise material or substantial allegations of error in that report. We have considered all the statements, replies, and motions which have been filed. We will discuss these positions, however, primarily as they assist in illuminating the basis for our decision.

Based on the submissions of the parties and the analysis of the 1968 freight car study in the interim report, we herein adopt the rules and the scale of incentive charges attached as appendix B hereto. They differ in certain respects, as will hereinafter appear, from the proposed rules of the interim report, which are set forth in appendix A to this report.

THE 1968 FREIGHT CAR STUDY

The nature and results of the 1968 study (appendix A to the interim report) will not be repeated in detail. Briefly, the 1968 study involved a sampling of the demand and supply conditions in 1968 for several different types of freight cars. On the basis of this study, we found that there are insufficient unequipped, general service boxcars to meet the orders for such equipment throughout a large part of the country for the 6-month period, September through February.

On January 14, 1969, we entered a further order stating that "refinements in the study program appear desirable." We accordingly proposed that the order initiating the 1968 study be

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expanded primarily to include additional car types.³ No further action was taken with respect to that proposal.

The sampling plan of the 1968 study met all requirements for a scientific survey. The critics of the study point to no specific weakness in it. The validity of the resulting data has been checked, as we stated in the interim report, by the accepted practice of computing standard errors and related coefficients of variation for each cell of collected data. (A statistical "cell" or "data cell" refers to each number having statistical significance. The word derives from the fact that the intersection of a row and a column in a statistical table forms a box or cell.) Some data were rejected due to high variability; but it is not unusual for a few data cells to be rejected in a large and complex study. All of the remaining cells contain data that are statistically valid. The rejection of a few data cells having high variability tends to increase the reliability of the complete study results which are highly acceptable according to probability standards applicable to a complex nationwide sample survey of this kind.

Penn Central seeks to explain some of the delays experienced by shippers by conceding that "a significant proportion (25 percent-30 percent) of all freight stations are served on a less than once-a-day basis." It argues in terms of a Monday-Wednesday-Friday "schedule for deliveries," as if no delay can occur when a carrier has institutionalized a "schedule." Obviously, if its shippers placed orders in the 1968 study for immediate delivery of cars—which were filled late because of the "schedule," or because that day's train had already left, or for any other reason—the shippers nevertheless experienced a delay in service; and such delay, to whatever extent it occurred, is properly considered by us in determining whether the availability of cars was sufficient to meet the shippers' demands for service.

The 1968 study does not assume, as it is alleged, that the railroads must in all cases supply cars for loading within 24 hours. The primary demand factor relied on in the study was comprised of (1) unfilled orders for which placement was requested prior to the study day, (2) orders filed on a prior day requesting placement on the study day, and (3) orders filed on the study day requesting placement on that day. The basic demand statistic, therefore, indicated the carriers' performance in filling orders on a current basis, rather than within 24 hours.

³The 1968 study covered 13 types of freight cars. The 1969 order proposed expansion of this coverage to 19 types.

The comment was made in one or more of the statements that no shortage is shown, since only 1.3 cars of every 100 were not furnished in 1968. This comment fails to take into account the long delays experienced by many shippers ordering cars. During the 12-time periods of the study, there were over 273,500 unequipped boxcars delivered after delays of more than 2 days; and 36,000 of those cars were delivered after delays of more than 12 days.⁴

Others seek to equate the percent of failures to place cars with the present of the audits in which overordering was found. No such correlation is possible on the present record. The car placements were made in response to orders for placement on or before the study day, and are unrelated to the study by our car service agents of orders received at certain stations.

Penn Central urges that marketing and operations studies are needed before any incentive per diem may be prescribed. It suggests that such information is "not readily available" without ever stating expressly that the studies are presently unavailable to it. More importantly, Penn Central does not show by any specific evidence that it is unable to improve the utilization of boxcar equipment or expedite delivery of cars on its own lines, or that incentive per diem will not affect utilization. It merely claims, again without specific evidence, that more cars will merely augment the carriers' surpluses.

Certain parties also allege without supporting data that shipper delay is the primary cause of boxcar shortages, and complain that the 1968 study fails to take this into account. We are aware that the boxcar shortage is a many-sided problem. This proceeding seeks to test whether a financial incentive can be employed to augment the car fleet. We do not assume that incentive per diem is the only remedy; on the contrary, we would urge the industry and the shippers to cooperate in studying the causes of whatever shipper delay may exist and to avoid unnecessary delays in the loading and unloading of cars.

The statements of shipping interests of record and our own long experience with the Nation's car service problems support the finding of a national boxcar shortage. The 1968 study, besides affording valid statistical evidence of this shortage, gives us valuable assistance in analyzing the problem and settling

⁴A preliminary staff analysis of the freight car study was presented to the Senate Subcommittee on Surface Transportation. We have not relied on that analysis in the writing of the interim report and this report, and will refer to the underlying data of that analysis only insofar as they are pertinent to our own analysis.

upon the best remedy now available to us consistent with the purposes of section 1(14)(a).

We find that the 1968 study provides us with adequate data to support the action taken in this report and order. We further find, on the basis of this study and the submissions of the parties, that the supply of general service, unequipped boxcars is not adequate to meet the orders for such equipment throughout a large part of the country for the 6-month period, September through February. In the interim report and in this report, we have clearly not attempted to resolve all issues concerning the national freight car supply, but only those that permit a logical determination of the requirements for unequipped boxcars. As our study of other car types continues, and as we gain experience under the incentive per diem charges adopted herein, modification or expansion of the rules and charges may well be required.

INCENTIVE PER DIEM CHARGES

Limiting the incentive charge to unequipped boxcars.—The interim report and the adopted rules limit the incentive charges to apply on unequipped boxcars. Several shippers and carriers suggest that the charges should be expanded to apply on more types of cars, such as covered hopper cars.

In this proceeding we are giving first priority to the boxcar. The data we have reviewed clearly show the national boxcar shortage, and indicate wherein an incentive may usefully serve to alleviate the shortage. More study of the data relating to other cars is necessary. Limited application of the incentive charge at the outset should more readily permit us to measure its effectiveness.

The Seaboard Coast Line complains that it will not receive incentive per diem under the proposed rule when its equipped, expensive, and more modern boxcars are on other lines. It overlooks the scale of basic per diem charges,⁵ which provide larger per diem payments for the more modern and more expensive cars. For example, for a \$5,000 boxcar that is 20 years old, the basic per diem (time charges) is \$1.50; but for a 5-year old boxcar costing, let us say, \$16,000 the basic per diem (time charges) is \$4.45.⁶ Seaboard, like all other carriers that

⁵As prescribed in *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 333 I.C.C. 176 (1968).

⁶See also interim report, appendix B.

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have continued to purchase the new and more expensive cars will receive fair compensation.

The issue presented, however, chiefly concerns how best shall we move forward to enlarge the boxcar fleet. The economies to be realized in the operation of certain cars and the competitive need for specialized equipment provide incentives for the carriers to continue their purchases of those cars. In the meantime, the boxcar remains the "workhorse" of the fleet, and we have not been shown evidence that it can or will be replaced in that role. On the contrary, its primary role remains and yet the number of boxcars in active service has declined, resulting in the unsatisfied demand that the 1968 freight car study helped us to analyze. The interim report proposed a logical beginning to meeting this problem under section 1(14)(a).

Amount of incentive per diem on unequipped boxcars.—We have proposed, and we herein adopt, an incentive per diem on unequipped boxcars based upon increasing the rate of return on investment allowed car owners in the basic per diem proceeding from 6 percent per year to an overall 12 percent per year. As we stated in the interim report, such a rate should bring returns on investment in unequipped boxcars comparable to the higher average returns earned by nonregulated corporations,⁷ thereby making investment in the national boxcar fleet a desirable alternative investment.

The parties propose a number of alternative approaches to the amount of incentive charge. One carrier proposes a flat rate of \$5 per car regardless of the car's age or cost; another proposes a variable charge; and others merely seek to have us impose unspecified higher charges.⁸ No evidence was produced by these parties beyond the opinions of certain railroad officials, with whom other officials and shippers disagreed, that the proposed scale would be ineffective as an incentive. As one railroad official stated,

***To flatten the rate would be to overreward the owner of the older, obsolescent cars, and to under-reward the owner of newer, more modern cars. The

⁷The rate of return was computed from balance sheet and income figures compiled by the Internal Revenue Service, and included corporations having no income in the period as well as corporations earning very high rates of return. The study in our view produced a reasonable average figure reflecting the typical experience of unregulated companies and a gauge of the incentive to disinvest in the railroad industry, and hence a reasonable measure of the incentive needed to encourage such investment.

⁸Several parties urge that the proposed incentive scale is too high; but none has shown that the proposed charges would impose an undue burden on it or on any group of carriers.

new cars get more use; they are able to carry more loading; they need less "down time" for maintenance and repair; and they have many advantages over older cars, deriving from the constant development of the technology of car design and construction. A flat rate is not as much of an incentive to the acquisition of new cars as is a rate scale related to age and original cost.

The data we have seen convince us that no higher average rate of return than 12 percent is needed to serve as a reasonable incentive, and that a higher figure would, therefore, provide unjust and unreasonable compensation to freight car owners.

Besides the potential rate of return, there are several other factors arising out of this proceeding that should tend to produce a renewed consideration of investment in the boxcar fleet by the railroad industry. The earmarking requirement, which we considered in the interim report and adopt herein, is a significant factor. But beyond that requirement, certain debtor roads will also be given an incentive to invest in the boxcar fleet.

As we stated in the interim report, we cannot be certain that the incentive per diem will increase the car fleet by any substantial number, or, if it succeeds in that respect, that it will alleviate the car shortage. Nevertheless, we believe the new charges coupled with the rule governing the implementation of the charges should produce improvements over a period of years.

Some of the parties seem to desire an unattainable certainty regarding the effect of our decision before any decision is reached and prior to the implementation of the statute. Only with actual experience can we determine the precise effect our decision will have; and for this reason, among others, we have emphasized that this proceeding will remain open for the submission of representations and data as experience is gathered under the new incentive charges.

Six-month application of the charges.—In the interim report we proposed to apply the scale of incentive charges over a period of 6 calendar months of each year. The report proposed that the carriers earn a rate of return of 6 percent as part of the basic per diem in the March-August period, and a rate of return of 18 percent in the September-February period through both the basic and incentive charges. An overall 12-percent rate of return would result for the annual period.

As we stated in the interim report, the use of an 18-percent return in the heavy-loading period should stimulate the faster return of cars in a period showing a regional imbalance in car

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supply, and should stimulate some debtor railroads ("debtor" in terms of net per diem balances) to purchase cars. The entire incentive amount would apply in the heavy-loading period of most debtor roads and hence in their period of greater ability to pay—or to invest in equipment.

A few railroads suggest that the September to February period does not reflect their heavy-loading period; others suggest the incentive per diem should apply throughout the year. The 1943 data show the September-February period was a heavy-loading period both nationally and regionally. The few exceptions of record do not disprove the findings based upon this data. Moreover, the individual need of particular carriers for cars in the March through August period can be remedied by service orders or car distribution directives. In the meantime we seek national solutions to the national 6-month shortage.⁹

The effect of a 6-month application of the incentive rate of return should be to improve performance over a 12-month application of such return. The 6-month allowance of an 18-percent rate of return should bring to the creditor lines a reasonable annual return of 12 percent,¹⁰ plus the additional benefits resulting from a bunching of the incentive element in the 6-month period. If better utilization results from the bunching of the collection of the incentive return, as we believe it will, the effect of better utilization should also spill over into the other months.

Another matter relating to the application of the incentive charge raised by the parties concerns the length of time it will apply. We cannot now foresee the termination of the incentive charge. The shortage of boxcars has been with us for years, and will not easily be solved, nor remedied in the near future. We do not reach any of the several problems suggested by a few railroads that might arise upon the termination of the incentive charges. None of the problems seems insurmountable, and each can be resolved when a discontinuance of the incentive is in fact considered.

Earmarking requirement.—We proposed in the interim report that net incentive balances, i.e., the excess of incentive charges

⁹Penn Central argues that the lack of local conditioning and storage facilities for grain is "the base problem;" but quickly adds that "service orders which move cars interregionally do not solve the problem. They merely shift it to another location," apparently conceding the national shortage of cars.

¹⁰Of course, we could not increase the incentive rate of return to 18 percent throughout the year, since an overall annual rate of return of 18 percent would exceed a reasonable level of compensation to freight car owners.

received by a railroad over those paid by it, should be set aside as earmarked funds for the purchase, building, or rebuilding¹¹ of general service, unequipped boxcars. We did not specify any particular size of boxcar, but only that it must be an unequipped and general service boxcar.

We adopt the earmarking requirement in our final order. We believe the various fears expressed by the parties—that earmarking will unduly restrict the investment of railroad funds, or even provide an overabundance of boxcars—have not been supported. Earmarking, as the spokesman for the Southern Railway System Lines aptly states, alone insures that the funds will be used as intended and hence is “the key to accomplishing the objective of the plan.”

The statute, of course, does not seek to remedy any alleged “imbalance” in the ownership of cars between creditor and debtor railroads. Besides the fact that no particular national advantage would necessarily flow from having the debtor roads own all cars purchased from incentive funds, the statute requires us to recognize and preserve entitlement to incentive charges based on the ownership of cars when it refers to an incentive charge that provides “just and reasonable compensation to freight car owners.”

We do not foresee an overabundance of plain boxcars on line of the owning roads as a result of the incentive charge. Such roads are generally the very railroads that show the most serious need for cars in the heavy-loading season. The parties making this charge present no data or any study to support their contention.

As in the interim report, we do not prescribe the timing of purchases. If traffic of particular roads falls off, they may desire to postpone purchases. The earmarked funds must eventually, however, find their way into the purchase, building, or rebuilding of the general service, unequipped boxcar, the type of car we have found to be in short supply.

In the absence of earmarking, the net incentive balances would obviously be deposited in the general funds of the railroads, which could then be expended for many purposes having little or nothing to do with the purposes of the statute. The statute was not adopted to provide the railroads with merely

¹¹By “build,” “rebuild,” or “purchase” we refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment.

increased compensation for the use of cars. Such a result furthermore would be contrary to our findings in the basic per diem proceeding.

The net balances derived from the incentive charge are not properly part of the general working capital of the recipient railroad. Railroad cars other than boxcars are not here found to be in short supply; purchases of such other cars, or for that matter, funds to make road improvements, must come from other sources. On the other hand, one of the subjects for future study, as the incentive program progresses, must also be the interchangeability, if any, of other types of cars with plain boxcars. Complete interchangeability between the boxcar and any other type is not shown of record.

The witness for the Southern Railway suggests a modification of the earmarking requirement to provide for earmarking of only the net balances after income taxes. The suggestion has merit and our form of the modification will be incorporated in the adopted rules.¹²

Five-year average.—The rule we proposed and herein adopt would require the beneficiary of the net credit balances resulting from incentive per diem to expend those balances only for building or purchasing new general service, unequipped boxcars, or for rebuilding older cars of such type, beyond their normal outlays of funds for such purposes. We accepted each carrier's average number of cars purchased, built, or rebuilt in the 5-year period 1964-1968 as representative of their current outlays. Our purpose here is to insure not only that the incentive charges are used for the purpose intended (and hence "earmarked"), but also that the incentive program stems the present downtrend in the national supply of plain boxcars.

Some railroads urge that the 5-year average penalizes those roads which purchased or acquired a larger than average proportion of the total purchases of general purpose boxcars in the period. They add that, similarly, those roads which purchased less than the average are rewarded by being permitted to more readily draw down funds. There is no showing that any expenditure for boxcars during the 5-year period was

¹²We later provide for the inclusion in the incentive program of the Canadian lines and intend that a Canadian line shall transfer the net incentive balances to a United States carrier for investment. The Canadian line would transfer its balance net of taxes and its transferee would invest the net balance without any further deduction for taxes. The plan is discussed in detail at a later point in this report.

made in expectation of the interim report. Each railroad that purchased cars, or delayed its purchases, did so for business reasons unrelated to this proceeding. Contrary to what a few carriers allege, we here recognize there were many managerial decisions underlying the purchase or failure to purchase boxcars, and the building or rebuilding and failure to build or rebuild boxcars, in the past. We merely plan a future course with those decisions fully in view.

There is no "reward" and there is no "punishment" in fact or intended in our use of the 5-year average. If the Congressional purposes to augment the car fleet and to improve utilization are to be met, there must be some base from which to build. Otherwise, there is no standard to measure and hence prevent the continual decline of the boxcar fleet. In the absence of the 5-year average, the creditor railroads could simply use the incentive funds to purchase their ordinary car replacements and maintain the present declining rate of such replacements. This would not be a satisfactory response to the shipper requirements for additional boxcars shown of record.

One of the parties suggests a "moving average" as an alternative to the 1964-1968 period average. The moving average would apparently be reconstructed each year by using the more current year as the fifth year in the computation and by dropping the oldest year. Such an approach, however, would dilute the average, and bring the same decline in boxcar supply which we have seen in the past. A moving average would reward creditor carriers, which failed to buy any cars in future years, with a declining requirement to buy cars. A moving average would not, therefore, be a suitable substitute for the 1964-1968 period.

A somewhat different approach is suggested by another party. Rather than make a frontal attack on the average, one of the parties suggests that a carrier should not be required to make up accumulated arrearages in its car purchases after making the average purchases in any one year. For example, if a carrier purchased no boxcars in the first year under the incentive order, and none in the second year, the suggestion is that the carrier should be required to purchase only its 1964-1968 average in the third year before dipping into the earmarked funds. Like the moving average, this approach would merely dilute the requirement of prior average purchases before using earmarked funds; and we have, accordingly, added clarifying language to section 1036.4 of the adopted rules.

In the interim report, we stated that for some carriers "it may be relatively easy to gear annual purchases to their 5-year average. For others, it may be necessary to defer annual purchases from the fund until the need arises for the purchase of cars in excess of the 5-year average." We here referred to the practice of many railroads of buying large quantities of equipment at one time, rather than a uniform amount each year. We did not seek to require each railroad to purchase or build an annual number of cars uniformly corresponding to its 1964-1968 average. We likewise did not intend to excuse a railroad when it accumulated a quantity of underpurchases from a prior period.

To illustrate our meaning, let us postulate two carriers ("A" and "B") each having a 1964-1968 average of 100 annual boxcar purchases. Let us further assume the following purchases in the first 3 years following our adoption of the incentive order:

Year	Boxcar purchases	
	Carrier "A"	Carrier "B"
1-----	0	0
2-----	0	0
3-----	400	200

We intend that carrier "A" should be permitted to purchase 100 general service, unequipped boxcars in the third year by using any portion of the earmarked funds; the first 300 boxcars purchased in the third year would have to be financed solely from other funds. Carrier "B," on the other hand, would not be permitted to use any of the earmarked funds for purchase of any of the 150 cars in the third year. It accumulated in our hypothesis a backlog of 200 cars in the first 2 years, and would be required first to purchase those cars, plus another 100 for the third year, before using earmarked funds.

We shall continue to rely on the 1964-1968 period.¹³ We have not been shown evidence that any road purchased an excessively high number of boxcars in that period for tax reasons or any other reason. The period is long enough and yet recent enough to provide, as we stated in the interim report, a fair gauge of

¹³Southern proposes a change in the language of section 1086.4 which we do not adopt. It suggests striking the words "its 1964-1968" in the two places they appear, and adding at the end of each sentence "that it built or purchased annually during the years 1964 through 1968." We do not intend that a carrier first purchase from other funds what it purchased "annually," but rather that it first purchase its 1964-1968 average.

the current, albeit inadequate, response of the railroad industry to the demonstrated need for additional boxcars.

REQUESTS FOR EXEMPTION AND INCLUSION

Requests for exemption.—Section 1(14)(a) authorizes this Commission to exempt a "group of carriers" from paying an incentive element if found to be in the national interest. An earlier version of the statute in the Senate authorized an exemption to specified carriers, such as those "which terminate a substantially higher percentage of interline traffic than they originate."¹⁴ The more general language adopted by Congress grants both the power and the duty to exempt a group of carriers only when this Commission finds it to be in the national interest.¹⁵

The Louisville and Nashville Railroad (L&N), proposes that all carriers be exempted from paying incentive per diem for the first 15 days after each interchange. The L&N argues that such an exemption would induce the prompt return of cars and at the same time provide "a reasonable length of time" for the using line to handle the car efficiently. It nowhere supports a standard of 15 days; and we fail to see how such a lengthy period would be justified for each and every haul of any length following interchange. Another basic objection to the L&N's approach is that it confuses the objectives of incentive per diem with "penalty per diem," a matter that has been discussed in the context of the Commission's authority under section 1(15) of the act.¹⁶ The exclusive purpose of the penalty would be better utilization. Unlike penalty per diem, an important function of incentive per diem is to create a fund and incentive for the acquisition of boxcars.

Several railroads seek the exemption of different groups of carriers from payment of the incentive per diem. The Long Island claims that Congress intended to exempt all the predominantly terminating railroads of the Northeast section of the Nation. In its view, once a railroad establishes that it terminates more cars than it originates, thereby experiencing a surplus of cars on its lines, it is entitled to an exemption. It also alleges that "the large percentage of detention" occurs on its lines "while the car

¹⁴S. 1098, 89th Cong., 1st sess.

¹⁵See, e.g., remarks of Senator Cotton, 112 Congressional Record 10250-51 (1966).

¹⁶E.g., see "Review of I.C.C. Policies and Practices," Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st sess., pages 105, 343-44.

is in shipper hands;" it, therefore, avers that incentive per diem would not cause it to acquire cars, in view of the large number of surplus empties continuously on its tracks, but merely add to its deficit freight operations. The Florida East Coast Railway, among others, makes similar arguments in favor of an exemption. It shows that, as a predominantly terminating railroad, it continuously has a surplus of boxcars on its lines, and asserts that it now operates efficiently and possesses a sufficient number of cars to protect its loadings.

We have given careful consideration to the requests of the several terminating railroads for an exemption. In our view, it would not be in the national interest to exempt a group of carriers merely because they terminate a substantially greater number of carloads than they originate, or because they already own a sufficient number of cars to satisfy their own needs.

The statute requires incentive per diem both to contribute to car utilization and distribution, and to encourage the acquisition and maintenance of an adequate car supply. The terminating roads that have requested an exemption argue that they cannot be expected to add to the national car fleet by direct purchase; nevertheless, they can be expected to contribute to improved car utilization, given the incentive to do so. Moreover, a terminating railroad, like any other railroad, has a substantial interest in the maintenance of a national car supply, whether by direct purchase, or indirectly by better enabling the creditor roads to augment the car fleet.

The statute also refers to providing just and reasonable compensation to freight car owners. As we explained in the interim report, this refers to compensation for risks beyond those included in the basic per diem charges which may be considered by us in seeking to alleviate a shortage of cars. The terminating roads should in fairness bear a portion of the cost of these additional risks.

The terminating lines complain that, unlike debtor per diem railroads such as Penn Central, they do not as a practical matter have the choice to purchase additional equipment or to pay incentive per diem. Their purchase of additional equipment may not be economically feasible. But our giving carriers such as Penn Central the choice denied to the terminating lines has not lessened the burden on Penn Central. The debtor railroads are treated equally, since the financial cost to those carriers that decide to purchase cars directly will not be any less, and may be more, than the cost of incentive per diem.

The argument is made that the incentive charges should not apply to a bridge carrier which is required to receive cars as a connecting railroad for delivery to another railroad. Such a carrier would pay incentive per diem for the same reason it pays basic per diem, namely, that as a bridge carrier it enjoys a division of the revenue and hence should bear a portion of the expense and investment. A like response pertains to the argument that incentive charges should not apply when a car movement is outside the "control" of a particular railroad, such as in the hands of a shipper for loading or unloading. Both basic and incentive per diem charges place the burden on the carrier nearest in time (and generally distance) to the point of loading or unloading, and among all other railroads (including the owner), such a carrier fairly bears the per diem burden.

While a car is under load, the road on which the car is located benefits from use of the car, and it is only logical that the road should be charged with the capital costs of using the car. Incentive per diem charges represent such costs because they are required in order to stimulate the amount of investment in freight cars necessary to provide adequate car service. Railroads also look to the handling of loaded cars as an area for improvement in overall car utilization. Improved yard and communications facilities help expedite the movement of loaded cars through terminal areas and through the classification process. Incentive per diem charges while cars are under load should tend to encourage investment in those facilities. Even when cars are under the control of shippers and consignees, the car days consumed in such use should be accounted for in freight revenues from the loaded movements associated with the free loading and unloading time. Charging the railroads incentive per diem while cars are under shipper control should induce the roads to be more attentive to the proper application of demurrage charges.

The Boston & Maine Railroad (B&M), in a "statement" of its attorney suggests it "intends to adduce evidence" which will show that an exemption should apply to "many railroads" on account of their dire financial condition or markedly lower rate of return on investment. Since B&M presented no evidence of such a condition applicable to any railroad, as it alleges, we fail to see the pertinence of its allegation. B&M and other carriers emphasizing their financial condition either fail to show the dollar impact of the proposed incentive per diem at all, or having shown the dollar cost fail to demonstrate that such cost is a substantial portion of their

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revenue and is unduly burdensome. In addition, the basic per diem costs of some carriers should be less than their present costs when the new scale of basic charges becomes effective. They further fail to show that the burden, if any, should somehow take precedence in the national interest over the role a terminating railroad can play in the Congressional plan for augmenting the national car fleet and improving car utilization.

The switching and terminal carriers that seek an exemption do not show such an exemption to be in the national interest. These carriers pay per diem on all cars they handle subject to a reclaim allowance from the connecting trunkline carrier. For the first 7 days that cars are in its control, the Brooklyn Eastern District Terminals, for example, is entitled to reclaim of per diem from the line-haul carriers, which will also apply to incentive per diem. The New York Dock Railway, on the other hand, pays no per diem. No showing is made that the payment of incentive per diem will substantially increase the per diem bills of any of these railroads; but even if an increase will occur, it will occur only after the expiration of reclaim periods, which should be adhered to, or perhaps renegotiated, or if too restrictive, prescribed by us.¹⁷

Incentive per diem will, like basic per diem, be subject to the present reclaim arrangements between railroads. The switching and terminal railroads, therefore, will be liable for incentive per diem just as they now are liable for the basic per diem payments.

Rate and division adjustments may be required as a result of incentive per diem. We do not reach the questions inherent in the statements filed by several carriers, for example, as to whether there should be any increase in the tariff rates and charges on account of increased per diem costs. Any such proposals must be presented to us in tariff form subject to the statutory notice provisions and our authority to suspend and to investigate.¹⁸

A few switching and terminal companies and short lines urge an increase in demurrage to offset incentive per diem.¹⁹ Since

¹⁷The Terminal Railway Alabama State Docks, a railroad wholly owned by the State of Alabama, alleges that it cannot prevent intrastate shippers from defeating the incentive charge. It argues that as a matter of State law, a penalty charge for the use of equipped boxcars applies to interstate, but not intrastate, shippers, and, accordingly, intrastate shippers may shift to the use of the more valuable equipped boxcars at a lesser per diem cost. The State's self-imposed limitation on applying the penalty charge should not defeat incentive per diem; rather, the practice may unduly discriminate against interstate commerce and hence be an unlawful practice governing intrastate shippers.

¹⁸Similarly, rate adjustments may be required for intraterminal, interterminal, post and intraplant switching. We express no opinion.

¹⁹Other switching and terminal carriers argue, on the other hand, that increased demurrage would simply result in loss of traffic.

the line-haul rates necessarily reflect the present cost to the carriers of the free-time allowance, free time at the ports, and demurrage, it may be that the incentive charge will require future adjustment to reflect the increased per diem costs. However, no evidence has been presented on these questions, and the new basic per diem charges should decrease the per diem costs of some railroads. Accordingly, we do not reach the effect of incentive charges on free-time allowances and demurrage charges on this record. We will entertain specific proposals from the carriers to deal with such questions when the need and the evidence are presented.

In this area, as in others relating to incentive per diem, we do not close the door to later revision of our order. Following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceeding. Accordingly, we are unable to find that it would be in the national interest to exempt any groups of railroads from the payment of incentive per diem charges at this time.

Requests for inclusion.—The interim report exempted all Mexican and Canadian railroads from the payment of incentive per diem. Eleven Canadian railroads request to be included in the incentive program. The two major Canadian railroads are the Canadian Pacific Railway Company and the Canadian National Railways. The former is a publicly owned stock company and the latter is wholly owned by the Government of Canada.

The Canadian Pacific was incorporated pursuant to an act of the Parliament of Canada in 1881, and currently operates over 16,000 miles of railway in the United States and Canada. Among its controlled lines in the United States is the Soo Line Railroad Company. Canadian Pacific owns 704,953 shares of common stock of the Soo Line, and has power to vote an additional 7,850 shares, which together constitute 56.37 percent of the total voting power evidenced by the Soo Line's outstanding shares. The Soo Line owns over 6,000 general service, unequipped boxcars, and over 1,500 general service equipped boxcars.

The Canadian National operates over 23,000 miles of main-line track in Canada and the United States. It maintains numerous connections with United States carriers. It has three wholly owned subsidiaries which operate entirely in the United States, including the Central Vermont Railway, the Grand Trunk Western Railway

(which owns and operates 879 miles of track), and the Duluth, Winnipeg and Pacific Railway.

The additional eight Canadian railroads, which join in the request for inclusion, are the following:

Algoma Central Railway
Canada and Gulf Terminal Railway
Essex Terminal Railway
Napierville Junction Railway
Northern Alberta Railways
Ontario Northland Railway
Roberval and Saguenay Railway Company
Toronto, Hamilton and Buffalo Railway

Each of these carriers is a private or public stock company, except the Ontario Northland, which is owned by the Government of Ontario; and the Northern Alberta Railways, which is owned in part by the Canadian National and in part by the Canadian Pacific.

These railroads argue in a joint pleading that per diem charges must be uniform throughout Canada and the United States. If incentive did not apply to Canadian cars, the Canadian railroads state, (1) United States carriers would, whenever possible, use the many Canadian cars that come into this country and unduly delay their return to Canada; and (2) originating United States carriers would tend to promote the routing of their cars via United States lines (to earn greater per diem), and hence discourage use of possibly faster Canadian routes. As part of the delayed return of Canadian cars, the Canadian roads foresee that their cars would be loaded last in the United States, held for loading more often than comparable United States cars, repaired last, and use for traffic where the cars are slow in releasing.

The data presented by the Canadian National and the Canadian Pacific show the following distribution of boxcars in heavy-loading period (September-February) since 1964:

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Canadian National Boxcars

Period	CN total average inventory	CN boxcars on U.S. lines		U.S. boxcars on CN lines	
		Average	Percent ¹	Average	Percent ¹
September-February 1964-1965	56,853	10,296	18.3	4,603	8.2
September-February 1965-1966	55,454	10,917	19.7	4,917	8.9
September-February 1966-1967	55,556	9,656	17.4	4,594	7.9
September-February 1967-1968	56,645	9,433	16.7	3,027	5.3
September-February 1968-1969	57,019	11,496	20.2	3,663	6.4

Canadian Pacific Boxcars

Period	CP total average inventory	CP boxcars on U.S. lines		U.S. boxcars on CP lines	
		Average	Percent ¹	Average	Percent ¹
September-February 1964-1965	51,056	8,569	16.8	2,214	4.3
September-February 1965-1966	51,357	9,546	18.6	2,663	5.2
September-February 1966-1967	50,694	8,056	15.9	2,370	4.7
September-February 1967-1968	49,063	6,973	14.2	2,213	4.5
September-February 1968-1969	48,422	8,008	16.5	2,397	5.0

¹Percentage of total inventory.

The data indicate that a substantial number of Canadian boxcars are on United States lines in the heavy-loading period, and that these Canadian carriers are substantial creditor lines insofar as per diem payments are concerned. The data also show that by far the major portion of the Canadian fleet is in service within Canada during this period, and that the level of United States usage of Canadian cars has not substantially varied from year to year.²⁰

The Canadian railroads present a convincing argument that the complete elimination of the Canadian railroads from the incentive program could create dislocation of equipment and reduce car utilization. We are not convinced, however, that their inclusion in the program on the same footing with United States carriers can as a practical or legal matter be accomplished.

²⁰Similar findings pertain to the annual data of record for the two Canadian roads.

The Canadian railroads are subject to our jurisdiction only to the extent they operate within the United States. They do not file annual reports of their entire operations with us. The Canadian National, for example, states on this record that it owns 35,401 boxcars as of January 1, 1970. For the year ended December 31, 1969, its relatively minor lines operating in the United States reported the following ownership of boxcars in their respective annual reports to us:

Reporting carrier	Reported boxcars owned
Canadian National Lines in Michigan.....	None
Canadian National Lines in New England.....	1
Canadian National Lines in New York.....	None
Canadian National Lines in Vermont.....	None

Besides the paucity of data, the Canadian lines appear to concede that our lack of control over their operations could lead to divergencies from the rules we adopt to govern the application of the incentive charges.

A further serious question is presented by the fact that the application of incentive charges on Canadian cars, and full compliance with earmarking, could not likely increase the number of Canadian cars in the United States. On the contrary, even if the Canadian carriers fully complied with our order on a voluntary basis, the practical effect of incentive charges would likely be that United States carriers would be paying for the enlargement of the boxcar fleet *within* Canada.

It seems clear to us, therefore, both that the Canadian railroads are entitled to relief from the specific problems they describe, and that special rules must apply to the Canadian railroads, if they are to be included in the incentive program. Let us then turn to the specific problems described by those railroads.

First, the Canadian railroads allege that originating United States carriers may route the cars owned by United States railroads around Canada rather than over the more direct Canadian routes. This is more a problem of the application of the incentive charges on United States cars than on Canadian cars; and hence we find that incentive charges should continue to apply on United States boxcars whether moving within the United States or in Canada, in the same manner that basic per diem applies to United States cars while in Canada.

Second, the Canadian railroads maintain that United States carriers will unduly delay the return of Canadian cars, if incentive charges do not apply to the latter cars. To remedy this difficult, but clearly potential, problem we find that incentive charges shall apply on Canadian boxcars in like manner and subject to the same rules applicable on United States boxcars with the exceptions described below.

In section 1036.1, set forth in appendix A of this report, the phrase "the owning railroads" shall be changed, as it applies to Canadian carriers, and the following will be added:

or the United States class I railroad which is designated by the owning railroads of Canada, ***

We will add at the end of the first sentence of section 1036.3: "and shall maintain separate accounts for funds received on Canadian owned boxcars." And we will add the following new third sentence in section 1036.4: "Net balances on Canadian owned cars may be drawn down once the designated carrier has built, rebuilt, or purchased its 1964-1968 averages as set forth above; but such drawdowns shall not affect the carrier's accumulation of arrearages resulting from prior failure to build, rebuild, or purchase its 1964-1968 average." These provisions should insure that the Canadian funds do not dilute the incentive rules as they relate to the United States railroad receiving the net balances on Canadian cars.

The Canadian National and the Canadian Pacific should have no difficulty in designating their major United States subsidiaries to receive the incentive per diem on their cars. We are not advised concerning the number of cars owned by the smaller eight Canadian railroads. If they anticipate or in fact experience unusual difficulties in designating a recipient of the charges, we will entertain specific proposals from them.

Clearly, by having the incentive charge apply on Canadian cars and yet be payable to a United States carrier, we both solve the specific problem of delayed return of cars described by the Canadian roads, and the new problems that would be created if the incentive charges applied without the changes we have directed. The incentive charges, subject to the rules for their application, as modified herein, will accord fair and reasonable treatment of the Canadian carriers.

ULTIMATE FINDINGS

We find and conclude that the rules and charges set forth in appendix B hereto will provide just and reasonable compensation to owners of general service, unequipped boxcars, contribute to sound car service practices, including efficient utilization and distribution of cars, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

An appropriate order will be entered.

COMMISSIONER BUSH, being necessarily absent, did not participate.

APPENDIX A

Rules and regulations proposed in the interim report

PART 1036--INCENTIVE PER DIEM CHARGES ON BOXCARS

§1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads the additional per diem charges set forth in §1036.3 on all boxcars shown below,

Mechanical designation	Code Number
XM -----	B100-109, B200-209, B300-309
XMI -----	B110-119, B210-219, B310-319
XMIH -----	B120-129, B220-229, B320-329
VA -----	B040
VM -----	B050
XC -----	B060
XCI -----	B070
XU -----	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Canadian and Mexican owned cars are excepted from the operation of these rules. The rules of this part shall apply to intrastate, interstate, and foreign traffic.

§1036.2 *Amount of incentive charge.*—The incentive charges applicable to each cost bracket by age group are set forth below:

INCENTIVE PER DIEM CHARGES—1968

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Amount of incentive per diem on bonuses (collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	\$0-1,000-----	\$0.32	\$0.27	\$0.22	\$0.17	\$0.11	\$0.08	\$0.04
2	1-3,000-----	0.65	0.54	0.44	0.33	0.23	0.12	0.07
3	3-5,000-----	1.30	1.09	0.88	0.67	0.48	0.28	0.14
4	5-7,000-----	1.95	1.63	1.32	1.00	0.68	0.37	0.21
5	7-9,000-----	2.60	2.18	1.75	1.33	0.91	0.49	0.28
6	9-11,000-----	3.25	2.72	2.19	1.67	1.14	0.61	0.35
7	11-13,000-----	3.80	3.26	2.63	2.00	1.37	0.74	0.43
8	13-15,000-----	4.54	3.81	3.07	2.33	1.60	0.86	0.49
9	15-17,000-----	5.19	4.35	3.51	2.67	1.82	0.98	0.56
10	17-19,000-----	5.84	4.89	3.85	3.00	2.05	1.11	0.63
11	19-21,000-----	6.49	5.44	4.39	3.33	2.28	1.23	0.70
12	21-23,000-----	7.14	5.98	4.82	3.67	2.51	1.35	0.77
13	23-25,000-----	7.79	6.53	5.26	4.00	2.74	1.47	0.84
14	25-27,000-----	8.44	7.07	5.70	4.33	2.96	1.60	0.91
15	27-29,000-----	9.09	7.61	6.14	4.67	3.19	1.72	0.98
16	29-31,000-----	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	31-33,000-----	10.39	8.70	7.02	5.33	3.65	1.96	1.12
18	33-35,000-----	11.04	9.24	7.46	5.67	3.88	2.08	1.19
19	35-37,000-----	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	37-39,000-----	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	39-41,000-----	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§1036.3 Earmarking.—Each common carrier by railroad shall segregate Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in §1036.1 for addition to such carrier's fleet in accordance with this part.

§1036.4 Use of funds.—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase in whole or in part new unequipped boxcars for general service described in paragraph 1, provided the carrier has in the same calendar year already built or purchased its 1964-1968 average number of such boxcars. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, provided the carrier has in the same calendar year already rebuilt its 1964-1968 average number of such boxcars.

§1036.5 Effective date.—The rules set forth in this part shall be effective from September 1 of each year through February 28 of the following year.

§1036.6 Rules and regulations suspended.—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day foreign cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 49 Stat. 379, 383, as amended, 49 U.S.C. 1, 12).

APPENDIX B

Adopted rules and regulations

PART 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS

§1036.1 Application.—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads or the United States class I railroad which is designated by the owning railroads of Canada the additional per diem charges set forth in §1036.2 on all boxcars shown below.

*Mechanical
designation*

Code number

XM	B100-109, B200-209, B300-309
XMI	B110-119, B210-219, B310-319
XMIH	B120-129, B220-229, B320-329
VA	B040

Mechanical
designation

Code number

VM -----	B060
XC -----	B060
XCI -----	B070
XU -----	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Mexican owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce.

§1036.2 *Amount of incentive charge.*—The incentive charges applicable in each cost bracket by age group are set forth below:

§37 I.C.C.

INTERSTATE COMMERCE COMMISSION REPORTS

Amount of incentive per diam on boscars (Collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	\$0-1,000-----	\$0.32	\$0.27	\$0.22	\$0.17	\$0.11	\$0.08	\$0.04
2	1-3,000-----	0.35	0.34	0.44	0.38	0.28	0.12	0.07
3	3-5,000-----	1.30	1.09	0.88	0.67	0.46	0.25	0.14
4	5-7,000-----	1.95	1.63	1.32	1.00	0.68	0.37	0.21
5	7-9,000-----	2.60	2.18	1.75	1.33	0.91	0.49	0.28
6	9-11,000-----	3.28	2.72	2.19	1.67	1.14	0.61	0.35
7	11-13,000-----	3.90	3.26	2.63	2.00	1.37	0.74	0.42
8	13-15,000-----	4.84	3.81	3.07	2.33	1.60	0.86	0.49
9	15-17,000-----	5.19	4.35	3.51	2.87	1.82	0.98	0.56
10	17-19,000-----	6.84	4.89	3.86	3.00	2.05	1.11	0.62
11	19-21,000-----	6.48	5.44	4.39	3.33	2.28	1.28	0.70
12	21-23,000-----	7.14	5.98	4.82	3.87	2.61	1.35	0.77
13	23-25,000-----	7.79	6.53	5.26	4.00	2.74	1.47	0.84
14	25-27,000-----	8.44	7.07	5.70	4.33	2.86	1.60	0.91
15	27-29,000-----	9.09	7.61	6.14	4.67	3.19	1.72	0.98
16	29-31,000-----	9.74	8.16	6.58	5.00	3.42	1.84	1.08
17	31-33,000-----	10.39	8.70	7.02	5.33	3.65	1.96	1.12
18	33-35,000-----	11.04	9.24	7.46	5.67	3.88	2.09	1.19
19	35-37,000-----	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	37-39,000-----	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	39-41,000-----	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§1036.3 Earmarking.—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part, and shall maintain separate accounts for funds received on Canadian owned boxcars. During any calendar year in which the carrier pays income taxes subject to a tax ruling governing incentive balances, the amount required to be earmarked by the carrier hereunder (or transferred by the Canadian carrier to its designee) shall be reduced by the applicable statutory percent, or by the percentage derived from dividing the income taxes in fact paid by the carrier by its net income, whichever percentage is less. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in §1036.1 for addition to such carrier's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in government bonds or other interest-bearing, temporary securities. The interest earned thereafter will become part of the earmarked fund.

§1036.4 Use of funds.—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase, in whole or in part, new unequipped boxcars for general service described in paragraph 1, *provided*, the carrier has in the same calendar year built or purchased its 1964-1968 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, *provided*, the carrier has in the same calendar year rebuilt its 1964-1968 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. Net balances on Canadian owned cars may be drawn down once the designated carrier has built, rebuilt, or purchased its 1964-1968 averages as set forth above; but such drawdowns shall not affect the carrier's accumulation of arrearages resulting from prior failure to build, rebuild, or purchase its 1964-1968 averages. As used in this section, "build," "rebuild," or "purchase" refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment.

§1036.5 Effective date.—The rules set forth in sections 1036.1 and 1036.3 of this part shall be effective from September 1 of each year through February of the following year.

§1036.6 Rules and regulations suspended.—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 24 Stat. 379, 383, as amended, 49 U.S.C. 1, 12).

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1036 - INCENTIVE PER DIEM CHARGES ON BOXCARS

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of April 1970,

EX PARTE No. 252 (SUB-No. 1)

INCENTIVE PER DIEM CHARGES-1968

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the interim report herein, are made a part hereof.

It is ordered, That chapter X of title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding a new part 1036, Incentive Per Diem Charges on Boxcars, reading as set forth in appendix B to the report attached hereto.

It is further ordered, That the railroad respondents herein be, and they are hereby, notified and required to observe, enforce, and obey the rules and regulations concerning incentive per diem charges on boxcars, as set forth in appendix B to the report attached hereto.

It is further ordered, That the railroad respondents herein be, and they are hereby, notified and required (1) to observe, enforce, and obey any annual or special reporting requirement which shall be issued hereafter in or pursuant to this proceeding, and (2) to retain all incentive per diem reports made and received, including reclaims, and all incentive per diem discrepancy and adjustment reports.

It is further ordered, That the rules and regulations prescribed in appendix B to the said report shall be published in the Federal Register.

It is further ordered, That this order shall take effect on June 1, 1970.

And it is further ordered, That this order shall continue in full force and effect until the further order of the Commission.

By the Commission,

H. NEIL GARSON,
 Secretary.

(SEAL)

387 L.C.C.

APPENDIX E

In the United States District Court Middle District
of Florida, Jacksonville Division

Civil Action (No. 70-574-Civ-J)

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION,
FLORIDA EAST COAST BUILDING, ST. AUGUSTINE,
FLORIDA, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS.

Civil Action (No. 70-577-Civ-J)

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS.

NOTICE OF APPEAL

I. Notice is hereby given that the United States of America one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order entered by this Court on February 18, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to

transmit the entire record to the Clerk of the Supreme Court.

This the 15th day of April, 1971.

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

RICHARD W. McLAREN,
Assistant Attorney General.
JOHN L. BRIGGS,
United States Attorney,
Jacksonville, Florida 32201.

APPENDIX F

**In the United States District Court Middle District
of Florida, Jacksonville Division**

(Civil Action No. 70-574-Civ-J)

**FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION,
FLORIDA EAST COAST BUILDING, ST. AUGUSTINE,
FLORIDA, PLAINTIFF,**

v.

**UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS.**

(Civil Action No. 70-577-Civ-J)

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF

v.

**UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS.**

NOTICE OF APPEAL

I. Notice is hereby given that the Interstate Commerce Commission one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order entered by this Court on February 18, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk

of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This the 15th day of April, 1971.

LEONARD S. GOODMAN,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

FRITZ R. KAHN,
General Counsel.

APPENDIX G

United States District Court, E. D. New York

(Civ. No. 70-C-700.)

THE LONG ISLAND RAILROAD COMPANY, PLAINTIFF,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS.

JULY 22, 1970.

Before FRIENDLY, Circuit Judge, MISHLER, Chief District Judge, and BARTELS, District Judge.

FRIENDLY, Circuit Judge. The Long Island Railroad asks us to enjoin the enforcement of an order of the Interstate Commerce Commission in Ex Parte No. 252 (Sub. No. 1) Incentive Per Diem Charges—1968, made under § 1(14)(a) of the Interstate Commerce Act. The order adopted rules and regulations establishing additional "incentive" per diem charges for unequipped boxcars from September 1 through February of each year.¹ The Long Island does not claim a lack of substantial evidence or of rational basis for the order if the Commission was entitled to rely on the study hereafter described without allowing this to be tested and rebutted at an oral hearing. Its criticisms go rather to procedure.² Chicago & Northwestern

¹ While the order became effective on June 1, 1970, payments will first become due for September, 1970.

² The parties stipulated that the issues presented for decision are:

1. Is it a jurisdictional prerequisite for the prescription of incentive compensation to freight car owners under

Railway Company intervened in support of the order.

The order is the latest chapter in a long history of freight-car shortages in certain regions and seasons and of attempts to ease them. Power over car service and payments by a railroad for the use of cars not owned by it was first conferred on the Commission by the Esch Car Service Act of 1917, 40 Stat. 101. One provision added to the Interstate Commerce Act a new section, now § 1(14)(a):

The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Another provision added the predecessor of § 1(15), which empowers the Commission, whenever it is "of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country" . . . either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested

section 1(14)(2) of the Interstate Commerce Act and sections 553, 556, and 557 of the Administrative Procedure Act, that the Commission grant the affected parties on demand duly made therefor: (a) the opportunity to cross-examine all witnesses of record as well as Commission personnel who conducted the 1968 Freight Car Study, which underlies the rule proposed and adopted by the Commission, and (b) thereafter the opportunity to offer rebuttal evidence and brief or argument.

2. Whether the Commission acted arbitrarily and unreasonably in denying an oral hearing after issuance of its order on January 14, 1969.

3. Whether the Commission adequately summarized the data collected in the 1968 Freight Car Study for the use of the parties to the proceeding prior to relying on the Study in the decision of the case.

carrier or carriers, and with or without notice, hearing, or the making or filing of a report" to take various steps designed to alleviate or end the crisis.

In utilizing the power conferred by § 1(14) to fix compensation by one railroad for use of the cars of another, the Commission had considered, at least since Judge Prettyman's characteristically able opinion for a three-judge court in *Palmer v. United States*, 75 F.Supp. 63 (D.D.C. 1947), that it could not include in per diem charges any amount designed solely to stimulate the early return of freight cars but was limited to fixing fair compensation in the public utility sense. Despite increases in the amount of such payments^{*} and the Commission's use of its emergency powers under § 1(15), car shortages have become an increasingly serious problem. As stated by the Senate Committee on Commerce in 1966, in recommending the amendment of § 1(14) with which we are here concerned, "Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe, and nationwide in scope as the national freight car supply has plummeted" S. Rep. No. 386, 89th Cong., 1st Sess., pp. 1-2; see also H. Rept. No. 1183, 89th Cong., 1st Sess. To help the Commission deal with car shortages more effectively Congress added to what had become § 1(14)(a) the following two sentences:

In fixing such compensation to be paid for the use of any type of freight car, the Commission

^{*}The Commission's latest pronouncement on this subject is *Chicago, B. & Q. Railway v. New York, Susquehanna & Western Railroad*, 332 I.C.C. 176 (1968), sustained in *Union Pacific Railroad v. United States*, 300 F.Supp. 318 (D.Neb.), and *Boston & Maine Railroad v. United States*, 297 F.Supp. 615 (D.Mass.), *aff'd per curiam*, 396 U.S. 27, 90 S.Ct. 196, 24 L.Ed.2d 142 (1969). The Commission proceeding consumed 15 years!

shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Pursuant to this new authority, the Commission, on June 23, 1966, instituted an investigation, Ex parte No. 252, Incentive Per Diem Charges, see 31 Fed. Reg. 9240, "to determine whether information presently available warranted the establishment of an incentive element increase, on an interim basis, to apply pending further study and investigation," 332 I.C.C. 11, 12 (1967). Representations were received from many railroads, the Commission's Bureau of Enforcement, and other interested parties, and hearings for the examination of witnesses were conducted. The Commission rendered a decision in October, 1967, 332 I.C.C. 11. The agency thought it to be "of the most utmost importance" that before imposing incentive per diem

charges "little, if any, doubt exist as to as the necessity and effectiveness," 332 I.C.C. at 13-14. It considered the available information, consisting of reports summarizing shortages and surpluses for each carrier,—the type of reports regularly made by Class I carriers to the Association of American Railroads—"insufficient to support any valid conclusions in this case," 332 I.C.C. at 17. While discontinuing the proceeding, it announced that it was embarking "on an investigatory-research program which will use sampling procedures developed and administered by our staff to provide current data on valid car orders and the available supply of operative cars to meet actual needs" and other studies relevant to the discharge of its duties under the 1966 amendment. Two Commissioners dissented, arguing in effect that the agency should not defer action that was plainly needed in a quest for a degree of certainty whose attainment, if possible at all, would take much time.⁴

In December, 1967, the Commission initiated the rule-making proceeding that gave rise to the order here under review, 32 Fed. Reg. 20987. It directed 72 Class I and 63 Class II line-haul railroads to compile and report detailed information with respect to freight car demand and supply at 2641 sample stations for selected days of the week during 12 four-week periods beginning January 29, 1968. The proceeding was "assigned for hearing" at the Washington office of the Commission "on a date hereafter to be fixed;" consideration would be given to requests for hearings at other places.

⁴The dissents remind the writer of his comment in 1960, that "the agencies have gone overboard in their zeal for a record that will drain the last dregs from the cask—and sometimes a good many staves as well." A Look at the Federal Administrative Agencies, in *Benchmarks* 65, 72 (1967).

In response to petitions filed by ten railroads (including the Long Island) early in 1968 for clarification of the order initiating the proceeding and for a pre-study conference, the staff conducted such a conference on April 23, which counsel for the Long Island attended. There was an extensive agenda, including several items relating to the disclosure of staff work papers and data obtained in the study. A detailed report of the results of the conference was sent to all parties. The Commission kept close watch over the data being supplied and, on July 22, 1968, called the railroads' attention to some instances of improper reporting although these were regarded as "rare" and "minor." Also, on January 24, 1969, it issued a further order indicating that as a result of the processing and a preliminary analysis of the accumulated data, "certain revisions and refinements" appeared desirable. The Commission sought the views of the parties about the revisions and suggested that any party disagreeing with the need for the further study should submit "its alternate suggestions, if any, as well as any suggestions as to additional studies which are deemed necessary to supplement those which are involved here." Various parties responded; the Long Island thought the proposed new study would be "useless and ridiculous" and a "waste of time and money on a wild goose chase." The proposed new study was not further pursued.

The Chairman of the Commission, another Commissioner who had dissented from the discontinuance of the 1967 proceeding, and members of the agency's staff appeared at a hearing before the Sub-committee on Surface Transportation of the Senate Committee on Commerce on May 13, 1969. See 91st Cong. 1st Sess., Serial No. 91-8. They presented a staff "Report of the Results of Freight Car Study in Ex Parte

No. 252 (Sub No. 1)." This included a narrative summary and analysis, a set of five tables of data, and a justification of the statistical reliability of the underlying information. The Chairman announced the Commission's intention to give the study "to the railroads in the very near future," *id.* at 4, and then to proceed to have "the validity of the study's conclusions * * * tested against other evidence" to be received "in the hearings which must be held before any incentive per diem rates can be established."

To say that the presentation was not received with enthusiasm would be a considerable understatement. Senators voiced displeasure at the Commission's long delay in taking action under the 1966 amendment, engaged in some merriment over what was regarded as an unintelligible discussion of methodology, *id.* at 119, and expressed doubt about the need for a hearing, *id.* at 116-17 (Senator Hartke), 119, 130 (Senator Magnuson). But the Commission's general counsel insisted that a hearing was needed, *id.* at 117, 119, and the Chairman of the Commission agreed, *id.* at 127.

The expressed intention to make the staff report available to the railroads shortly after the Subcommittee hearings was not carried out as such, although counsel for the intervenor obtained a copy and counsel for the Long Island acknowledges seeing the tables in the spring of 1969. The principal reason for this, apparently, was not any desire for secrecy but rather that the tables in this report assembled the data only for the first six and second six periods (as well as for the full year), a division which, it was concluded, was not sufficiently refined. In any event seven months later, in December 1969, an Interim Report of the Commission was released.

In the Report the Commission announced its tentative conclusion to adopt an incentive per diem charge

for standard boxcars only. This was to be payable only during the six months period from September 1 to the end of February. Since the incentive charge was to produce an additional 6% return over and above the 6% already fixed as fair compensation, the incentive payment during the six months was to be at the rate of 12% on depreciated cost. "Net incentive balances" were to be set aside in a reserve earmarked for the purchase of general service, unequipped boxcars in addition to normal replacements. The Interim Report included a sixteen page description of "The Railroad Freight Car Study" and nine pages of data and graphs drawn from it. In some respects the material was more and in other respects less detailed than the document presented to the Senate Subcommittee, to which reference was made. Attached to all this were a proposed rule embodying the Commission's tentative conclusions and an order directing that "verified statements of facts, briefs and statements of position" should be filed on or before February 24, 1970, and replies a month later, and "that any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced." One Commissioner thought oral hearing was required.

Nine railroads including the Long Island sought an oral hearing. The Long Island's request, made in the form of a motion for modification of the Interim Order, contended that the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557, guaranteed this as a matter of right and alleged compendiously that it was impossible for the carrier "to file a meaningful brief as a party respondent to this proceeding until it has had an opportunity to see the evidence it is being confronted with, crossexamine the proponents' witnesses and rebut such evidence as it deems approp-

private." In April 1970 the Commission entered a decision without having accorded an oral hearing. On that issue it found, referring to the APA:

No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that act.⁵ On the merits, after considering the comments that had been received, including the Long Island's request for an exemption of "all the predominantly terminating railroads of the northeast section of the nation," it adhered to the tentative conclusions of the Interim Report, with certain modifications not here material. It reiterated that the proceeding was "open-end"; that its studies concerning freight car shortage were continuing; and that "hearings or further proceedings may be necessary later as experience is gained under the incentive plan."

[1] The Long Island properly concedes "that the setting of rates for future application, including compensation to be paid by railroads for the use of freight cars not owned by them, is within the meaning of the terms 'rule' and 'rulemaking' as defined by subparagraphs (4) and (5) of Section 551 of the APA." Thus the Commission was obliged to proceed in accordance with § 553(c):

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

⁵ At another place in its report the Commission said:

In the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern, the requests for oral hearing, cross-examination, and argument are hereby denied.

After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

The Long Island seeks to avoid the effect of the first sentence of this subsection, which would foreclose its claim to an oral hearing, by invoking the last. Sections 556 and 557, there referred to, prescribe procedures for hearings "required by section 553 [rulemaking] or 554 [adjudication] of this title to be conducted in accordance with this section" and provide that

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

5 U.S.C. § 556(d).

The occasion for enacting the third sentence of § 553(c) is clearer than its meaning. When Congress adopted the rulemaking provision of the APA, it was obliged to take into account that in many regulatory statutes it had prescribed a "hearing" in cases of "legislative" action where due process would not require one of the traditional trial type. Congress could have provided in the APA that, despite such prior action, only "rulemaking" procedures would henceforth be required when the agency was making rules. It could have provided on the other hand that whenever a particular regulatory statute required a hearing, one of the trial type must be had even though the matter under consideration was a proposed rule. Instead it directed a trial-type hearing in the case of rules "required by the statute to be made on the

record after opportunity for agency hearing" (emphasis supplied).

At the time only a few federal regulatory statutes used the italicized phrase or an equivalent. The statute generally referred to as somewhat of a horrible example in this respect, see 1 Davis, *Administrative Law Treatise*, § 6.06, at 381-82 (1958), is the regulations provision of the FDA, 21 U.S.C. § 371(e) (3). Another, adopted subsequent to the APA and parroting the language of the last sentence of § 553(c), is the Fulbright Amendment of the Walsh-Healey Act, 41 U.S.C. § 43a, see *Wirtz v. Baldor Elec. Co.*, 119 U.S. App.D.C. 122, 337 F.2d 518 (1964). The Attorney General's Manual on the Administrative Procedure Act, p. 34 (1947), summarized what it termed "persuasive legislative history to the effect that Congress did not intend sections 7 and 8 [now 5 U.S.C. §§ 556 and 557] to apply to rule making where the substantive statute merely required a hearing." On the other hand, whatever Congress may have meant by a phrase carrying the mind back to the use of certiorari by the 17th century King's Bench, see Wade, *Administrative Law* 116-18 (2d ed. 1967), it is rather hard to believe that the last sentence of § 553(c) was directed only to the few legislative sports where the words "on the record" or their equivalent had found their way into the statute book. Thus the Manual states, somewhat inconsistently with the passage just quoted, that "where rates or prices are established by an agency after a hearing required by the statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing," and, in consequence, that Interstate Commerce Commission orders "which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies

Act on the basis of the evidence adduced at the agency hearing, must be regarded as 'required by statute to be made on the record after opportunity for an agency hearing.' " *Id.* at 33-34.

The trend of judicial decision has been to extend the agencies' powers to handle their problems by rulemaking. Two decisions of the Supreme Court have held that the statutory requirement for a hearing does not preclude an agency "from particularizing standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *F. P. C. v. Texaco, Inc.*, 377 U.S. 33, 39, 84 S.Ct. 1105, 1109, 12 L.Ed. 2d 112 (1964), thus explaining *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). *Siegel v. Atomic Energy Comm'n.*, 130 U.S.App.D.C. 307, 400 F.2d 778, 781-786 (1968), held that the last sentence of § 553(e) does not require adjudicative procedures with respect to the adoption of a rule excluding a certain topic from investigation in a licensing proceeding, despite a statutory requirement of a hearing "in any proceeding * * * for the granting * * * of any license or construction permit * * * and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees * * *." Courts of appeals have held that the "argument-type" hearing provided by the first sentence of § 53(c) was sufficient in respect of rules, made pursuant to general rule-making powers, which modified all existing licenses although the regulatory statute required a hearing, presumably of the trial type, for the modification of an individual license on the basis of facts peculiar to the licensee. *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892 (2 Cir. 1960), cert. denied, 366 U.S.

962, 81 S.Ct. 1923, 6 L.Ed.2d 1254 (1961); *American Airlines, Inc. v. C. A. B.*, 123 U.S.App.D.C. 310, 359 F.2d 624, 628-629 (in banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9 Cir.), cert. denied, 389 U.S. 844, 88 S.Ct. 96, 19 L.Ed.2d 112 (1967); *WBEN, Inc. v. United States*, 396 F.2d 601, 617-619 (2 Cir.), cert. denied, *King's Garden, Inc. v. F. C. C.*, 393 U.S. 914, 89 S.Ct. 238, 21 L.Ed.2d 200 (1968). However, in these cases, as well as in *George A. Rheman Company v. United States*, 133 F.Supp. 668 (E.D. Carolina, 1955), and *Tidewater Express Lines, Inc. v. United States*, 281 F.Supp. 995 (D.Md.1968), upholding the Commission's power to define the commercial zone of a city under the exemptive provision of the Motor Carrier Act, 49 U.S.C. § 303(b) (8), by rulemaking proceedings, the agency was purporting to act under a section of the regulatory statute empowering it to make rules without a hearing. The question thus was whether such a grant overrode a requirement for hearings in individual cases, and the issue whether even if "rule-making" was appropriate, the last sentence of § 553 (c) did not require compliance with § 556 was not presented.

[2] Without in any way disagreeing with these decisions, we uphold the Long Island's contention that the third sentence of § 553(c) was applicable. We do not have here a case where an agency is utilizing a general rulemaking power—as to which indeed Title I of this oldest of federal regulatory statutes is notably vague—in order to avoid the need for multiplicitous individual proceedings; the Commission was implementing a statutory direction for fixing future payments which almost necessarily contemplated action on something other than an individual basis. It is true

that for that very reason Congress by appropriate language could have empowered the Commission to do this by rulemaking without an adjudicatory hearing. See *WBEN, Inc. v. United States*, *supra*, 396 F.2d at 618. Instead Congress attached the Commission's authority to include an incentive element in per diem to a 1917 statute which required a "hearing."

However broad the meaning of "hearing" has now come to be, see 1 Davis, *Administrative Law Treatise*, § 6.05 (1958), we entertain no doubt that the 1917 Congress thought that, even in a context where the Commission would be prescribing only with respect to future payments, that term meant what the Supreme Court had said in *I.C.C. v. Louisville & Nashville Railroad*, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431 (1913), namely a proceeding in which "all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal,"*—in other words a hearing "on the record." The Commission does not

*This view is reinforced by the contrast, frequently encountered in the Interstate Commerce Act, between what the Commission may do only "after hearing," the words used in § 1(14)(a), and what it may do with something less, e.g., § 1(15). In this respect the case before us is somewhat the converse of *Seatrail Lines, Inc. v. United States*, 168 F. Supp. 819, 825-826 (S.D.N.Y. 1958), which held that the first sentence of § 553 of the APA controlled under § 4(1) of the Interstate Commerce Act, authorizing the Commission "after investigation" to allow a carrier "in special cases" to charge less for a longer than for a shorter distance, in part because of the contrast between this language in § 4(1) and that in § 4(2), providing that a rail carrier which had reduced rates to meet water competition could not increase them "unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

deny that it had always proceeded in this manner in administering § 1(14) before the 1966 amendment, see, e.g., *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659 (1947); *Chicago, Burlington & Quincy Railroad v. New York Susquehanna & Western Railroad*, 297 I.C.C. 291 (1955), 332 I.C.C. 176 (1968); *Investigation of Adequacy of Railroad Freight Car Ownership*, Docket No. Ex parte 241, 335 I.C.C. 264 (1969). Contrast *Seigel v. Atomic Energy Comm'n*, *supra*, 400 F.2d at 785-786. When the Commission sought the additional authority conferred by Congress in 1966, it emphasized that § 1(14) provided for hearings which, as its Chairman stated, "would be necessary in any event to determine among other things, deficiencies by type of cars and by carriers, and the most equitable means of correcting the deficiencies." Hearings before House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., Ser. 89-26, at p. 45 (1965); Hearings before Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess., Ser. 89-23, at pp. 14-15 (1966). The Commission conducted evidentiary hearings in the abortive 1967 incentive compensation proceeding, 332 I.C.C. 11, and intended to do so in this one, as its order initiating the proceeding and its statements to the Senate Subcommittee made clear. Moreover, the Commission's reference to § 556 in the statement from its April 1970 Report quoted above seems to assume that the last sentence of § 553(c) applies. In all these respects the case differs from *Joseph E. Seagram & Sons Inc. v. Dillon*, 120 U.S.App.D.C. 112, 344 F.2d 497, 499 n. 3 (1965), where a requirement that the Secretary of the Treasury give an "opportunity for hearing" before prescribing regulations under 27 U.S.C. § 205 was held not to demand adjudicatory procedures.

[3, 4] However, our agreement with the Long Island that the third sentence of 5 U.S.C. § 553(e) was applicable does not conclude the case in its favor. What Congress gave by that provision of the APA, it partially took away by another. The final sentence of § 556(d) provides:

In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Congress thus determined that even when rulemaking had to be done by a hearing "on the record," the record did not always have to be made in the traditional manner.⁷ The Interim Report indicated the Commission's intention to rely on this provision, and it is no matter that the agency initially planned to do otherwise or that its decision to adopt a more expeditious procedure may have been prompted by Senatorial spurs. The sole question for us is whether the statutory conditions were met.

The Long Island contends that the evidence on which the Commission relied was never "submitted," as § 566(d) requires. It urges that if the Commission wished to dispense with an oral hearing, the agency was obliged to place in evidence the 32,420 data sheets filed by the carriers and the field and staff audits of these on which the Commission admittedly relied. Conceding that "at first blush, it might seem a futile waste of time and money to remand" to the Commission for this purpose, the Long Island urges that giving the parties a reasonable opportunity to examine and eval-

⁷ Compare the Commission's "modified procedure" in certain rate cases prescribed in §§ 1.45-1.54 of its General Rules of Practice, discussed in *Davis & Randall, Inc. v. United States*, 219 F. Supp. 673 (W.D.N.Y. 1963).

uate these materials is demanded by minimum requirements of fair play.

[5] We agree it would have been better if the Commission had served upon the carriers a summary of the study more nearly resembling the 106 printed pages of text and tables it had presented to the Senate Subcommittee, revised in whatever manner the agency deemed to be desirable for the purpose in hand.* But the Interim Report placed the railroads on notice of the document that had been given to the Senate Subcommittee, most of which the Long Island had in fact seen, and which it would have been a simple matter for any carrier to obtain, and the analysis of the study in the Report was adequate to apprise the carriers of the general results and the conclusions drawn from them. The data sheets and audits would hardly have been placed in evidence

*In answer to a question from the bench, the Commission has advised in a supplemental memorandum that the staff did not prepare a subsequent report for the Commission comparable to the report submitted to the Senate Subcommittee. Part of the disparity between the length of the study submitted to the Senate Subcommittee and the summary in the Interim Report is due to the fact that the former included all types of freight cars whereas the latter was limited to unequipped, general service boxcars to which alone the proposed incentive per diem charges were to apply. However, the study given to the Subcommittee included other information, e.g., tables showing the number of days of delay in filling orders, which might have been useful to the railroads. The Long Island urges in its reply to the Commission's supplemental memorandum that further examination of the data might have shown a correlation between over-orders and long delays in filling orders and that the Commission's conclusion that "no such correlation is possible on the present record" simply reflects the agency's refusal to accord a fair hearing. But this issue had always been present and, as developed below, the Long Island could readily have obtained whatever additional data it needed for arguing its case.

if an oral hearing had been held. Their importance would have lain in possibly disclosing materials useful in cross-examining the staff witnesses or more likely, in view of the rarity of expert concession of error, in developing rebuttal. Whether there was to be an oral hearing or not, the Long Island's first job was to examine the basic data and find this out. Nothing stood in its way. The carriers had been advised at the April 1968 conference that tapes of the reported data could be made available, on request, to the Association of American Railroads; it developed that the cost of such a tape would have been only \$37. It appears that on receiving the Interim Report the Long Island did obtain tapes showing what the burden of the proposed order on it would be; it could as well have obtained the rest. It could also have sought access to the audits and to other work papers prepared by the agency's staff as a basis for the summary in the Interim Report.* If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case. Instead the Long Island's request for an oral hearing was silent as to any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal. The last sentence of § 556(d)

* If the Commission had not made these available, as we assume it would, they could have been obtained under 5 U.S.C. § 552(a)(3). Since any such underlying tabulations would be available on discovery in ordinary litigation, they would not fall within the exception of § 552(b)(5). See *Bristol-Myers Co. v. FTC*, 424 F. 2d 935, 939 (D.C. Cir. 1970). Staff memoranda making policy recommendations to the Commission stand differently.

would be deprived of all meaning if this were held sufficient to put the agency on notice that "prejudice" would result from the denial of an oral hearing. Even taking into account the further representations that have been made to us, we fail to see that prejudice has been established.

The short of the matter is that the decision here called for a leap of judgment by the Commission which detailed figures would inform but could not determine. Of course, if there were no car shortages in some regions and simultaneous surpluses elsewhere, there would be no occasion for incentive compensation. No one contested that there were; the dispute was over the degree and the cause. Both these issues were dealt with extensively in the verified statements submitted by the carriers, and we have yet to hear how cross-examination with respect to the statistics or the presentation of oral rather than written testimony would have aided materially in their resolution." When all had been said, the serious questions

"The Long Island's own verified statement in opposition to the proposed order was, for the most part, an argument that "the real culprit for violations of car service rules has been the consignee who after unloading a car reloads it with his products and sends it off in an entirely different direction than it came from" and that the grain industry utilizes boxcars for warehousing rather than transportation; the statement also argued for exemption as a terminating road. While the statement reiterated the demand for oral hearing, it advanced no specifics why this would be helpful.

In its brief to us the Long Island directed attention to the verified statements of Andrew C. Weamer on behalf of Penn Central Transportation Company and its affiliates and of Clifford J. Janis on behalf of Union Pacific Railroad Co. Mr. Weamer's statement conceded that "The study data appears to have been gathered by recognized methods of sampling and statistical techniques" but vigorously attacked the validity of the conclusions drawn. It did not suggest any need for cross-

remaining for the Commission were whether some form of incentive compensation would, in the words of the statute, "contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense," and, if so, what the form should be. Even the first question is by no means so easy of solution as the mere combination of shortages in some regions and concurrent surpluses in others might suggest. Whether the Commission provided right, or even rational, answers to these difficult questions is not before us in light of the stipulation of the parties limiting the issues, see fn. 2. Our sole task is to determine whether under all the circumstances the denial of an oral hearing significantly prevented the Long Island from fairly presenting its case. We have found no sufficient reasons to return an affirmative response.

The clerk is directed to enter judgment dismissing the complaint.

examining the Commission's staff as to the accuracy of the data or for the presentation of "live" rebuttal testimony. Mr. Janis' statement relied on the fact that in proposing a new study for 1969-70 the Bureau of Enforcement had admitted that some of the questions in the 1968 study invited "judgment determinations by personnel assembling data"; he also pointed to some instances in which the 1968 study had rejected data "due to high variability in the estimate using the data with substitution of days." While Mr. Janis thus concluded "that the 1968 study cannot conclusively show that there is a shortage of plain boxcars," he indicated no respect in which cross-examination of the Commission's staff would be helpful and went on to argue that, instead of the proposed incentive *per diem*, the Commission could better promote the purchase of boxcars by a basic *per diem* that would take account of the effects of inflation on the investment. Whatever the force of this argument, nothing would be gained by its presentation as oral testimony.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-279

**UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,**
Appellants,

v.

**FLORIDA EAST COAST RAILWAY COMPANY AND
SEABOARD COAST LINE RAILROAD COMPANY,**
Appellees.

**On Appeal from the United States District Court
for the Middle District of Florida**

**MOTION TO AFFIRM OF APPELLEE
SEABOARD COAST LINE RAILROAD COMPANY**

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July, 1971

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On Appeal from the United States District Court
for the Middle District of Florida

**MOTION TO AFFIRM OF APPELLEE
SEABOARD COAST LINE RAILROAD COMPANY**

Appellee, Seaboard Coast Line Railroad Company, hereinafter referred to as Seaboard Coast Line, pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed on the ground that the questions raised by Appellants are so clearly lacking in substance as not to warrant further briefing and argument.

QUESTIONS PRESENTED

Because of its finding regarding the first of the following issues, the lower court stated that it would "pretermitt discussion of all but the first point" from among these questions:

1. Were the parties to the Interstate Commerce Commission proceeding afforded a proper hearing by the Commission;
2. Did the Commission properly consider and apply the provisions of Section 1(14)(a) of the Interstate Commerce Act; and
3. Are sufficient reasons given for the Commission's conclusions, and are those conclusions supported by substantial evidence of record?

STATEMENT

This involves a direct appeal from the final judgment and decree entered on February 18, 1971, by a District Court of three judges specially constituted pursuant to 28 U.S.C. §2284 and §2325 enjoining, annulling and setting aside an Interstate Commerce Commission order, *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, which prescribed incentive per diem rates for a certain type of railroad car.

A. Incentive Per Diem Described

Each railroad in the United States pays a rental charge, called per diem, for the use of any kind of rail car owned by other railroads. The purpose of per diem is to compensate the owning railroads for their car ownership costs.

The proceeding now before this Court relates to *incentive per diem*, which is an additional charge over and above

regular per diem. Its purpose is to give railroads an incentive to promptly move cars and to acquire new ones. As prescribed by the Commission in the disputed decision, incentive per diem would apply to only one kind of car, plain boxcars of the type used by grain shippers.

B. Evolution of the Disputed Commission Order

The Commission's authority to impose incentive per diem is found in Section 1(14)(a) of the Interstate Commerce Act.¹ Congress enacted the pertinent provisions of that Section in 1966 and, later that year, the Commission began an investigation into the possibility of prescribing incentive per diem charges. The following year, on October 3, 1967, it discontinued the proceeding, that being done in *Incentive Per Diem Charges*, 332 I.C.C. 11 (1967), a decision which will sometimes be referred to as "the 1967 decision."

Later in the year, on December 15, 1967, the Commission published a notice requiring all railroads to participate in a study of rail car supply and demand by submitting data in response to a questionnaire. Then, on December 12, 1969, without having held hearings, and with only raw statistical data in hand, the Commission handed down a decision, described as an "interim report," in *Incentive Per Diem Charges—1968*, 337 I.C.C. 183. That decision "announced a provisional judgment with respect to the form and amount" of incentive per diem charges to be added to the basic per diem charges, but the payments were to be applicable only to "plain," or "unequipped," boxcars. The parties were permitted to comment upon the Commission's "interim report" by means of statements or briefs and, on April 28, 1970, the Commission handed down a

¹ Printed in full at pages 3-4 of the Appellants' Jurisdictional Statement.

final order which adopted all of the material "provisional" conclusions reached in its "interim report."

The decision of April 28, 1970, is found in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, and, while it is that decision and order which is the subject of this proceeding, it is founded upon, and is virtually the same as, the "interim report."

That final decision prescribed an experimental plan by which the Commission thought that it might improve the utilization, and the size, of the railroads' plain boxcar fleet through so-called incentive payments.

C. The Action in the Court Below

In June 1970, both the Seaboard Coast Line and the Florida East Coast Railway Company (FEC) filed complaints seeking to enjoin, annul and set aside the order of the Interstate Commerce Commission, dated April 28, 1970, in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217.

Upon motion of the FEC and of the Seaboard Coast Line, which had shown that it would lose some 1.8 million dollars annually because of the I.C.C. experiment, a temporary restraining order was granted. Subsequently, the District Court set aside the Commission's order insofar as it affects the Seaboard Coast Line and the FEC because of the Commission's failure to hold necessary hearings.

In the meanwhile, a United States District Court had handed down a decision related to the Commission's April 28, 1970, order in *Long Island Railroad Company v. United States*, 318 F. Supp. 490 (D.C.N.Y. 1970). By stipulation in that case, however, there was only one issue presented, and it had been made quite narrow; that is, the only question before the court was whether, in the absence of the

Long Island's failure to point to "specifics" related to the need for a hearing and since the Long Island did not put the Commission on notice that prejudice would result absent a hearing, the ICC was required to give the Long Island an oral hearing.³

D. The Positions of the Parties Here

The Commission urges that the questions are substantial for two reasons; first, that the District Court's decision, if allowed to stand, will disrupt the ICC's car experiment before it has been given a fair trial; and, second, it is urged that the action of the court below conflicts with the related lower court decision in *Long Island*.⁴

The ICC then asks this Court to find that the District Court was wrong in its action because the Appellees are said not to have been prejudiced by the ICC's handling of the proceeding; because the lower court "failed to assess the likely impact that the matters allegedly requiring an oral hearing would have had upon the Commission's conclusions"; and because the District Court "merely admonished the Commission to give 'strict adherence to cherished procedural rights.'" It was proper for the Commission to short-cut those rights, the ICC goes on to argue, because "it is extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order."⁵

This Appellee replies that whether or not the Seaboard Coast Line was *likely* to have convinced the ICC of its position is not the point. Rather, it was entitled to the protection of its procedural rights, and their denial here, in favor of the Commission's desire to still criticism from

³*Long Island Railroad Company v. United States*, 318 F.Supp. 490, 499-500.

⁴Jurisdictional Statement, pages 13-15.

⁵*Id.*, page 15.

Congressmen who were "impatient with delays,"³ prejudiced both the Seaboard Coast Line and the shipping public which it serves. Thus, the court below was correct in finding that the Commission acted illegally.

The Seaboard Coast Line replies, too, that, insofar as the "substantial issues" urged by the Commission are concerned, they are neither "substantial" nor new. It often has been said by the courts, including this Court, that the ICC must not act arbitrarily, and must follow established procedures; and, as the lower court carefully found here, there is no conflict with the *Long Island* decision.

Further, though the District Court did not reach these issues, the Commission did not properly apply the provisions of Section 1(14)(a) of the Interstate Commerce Act, did not give sufficient reasons for its conclusions, and, particularly, had no substantial evidence of record to support conclusions in the disputed decision which were at complete variance with its conclusions in the 1967 decision.

ARGUMENT

Throughout this entire proceeding, before the ICC and in the court below, this Appellee has taken the position that the Commission failed to give it a proper hearing and that such failure was damaging to it. That position has ample support in law and in fact, and the Commission's unusually lean Jurisdictional Statement avoids all reference to both the applicable law and the pertinent facts. For that reason, a recitation of considerable background material becomes necessary.

A. A Complete Hearing Was Intended

Back in 1966-1967, when it first considered the imposition of an incentive per diem under the then-new Section

³Jurisdictional Statement, page 6.

1(14)(a), the Commission held oral hearings, had the benefit of briefs, and even heard oral argument. It did so because it recognized that "all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. §551 et seq." are applicable.⁸ Finding that the record did not warrant the prescription of incentive charges, the Commission took care to point out that:

"Any alteration in the costs of transportation services, any diminution in their availability, produces repercussions throughout the entire structure. Thus, before we undertake to impose the charge authorized by P.L. 89-430, it is of the utmost importance that little, if any, doubt exist as to its necessity and effectiveness. As a former Chairman of this Commission observed before the Senate Freight Car Shortage Subcommittee in 1965, ' * * * if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates.' *Hearings on S.179 and S.1098, 89th Cong., 1st Sess., Serial No. 89-23, page 14.*"

The Commission had, in fact, promised the Congress that it "would exercise extreme caution" in using Section 1(14)(a). And, it did exercise such care in the first proceeding; in the 1967 decision. It did not do so the second time. Rather, it acted hastily, under "Senatorial pressure," as Judge Simpson said here,⁹ or moved by "Senatorial spurs," as Judge Friendly put it in the *Long Island* decision.¹⁰

In the beginning, the Commission made it quite clear that it intended to have a full hearing in this case, in-

⁸*Incentive Per Diem Charges*, 332 I.C.C. 11, 14.

⁹*Id.*, pages 13-14.

¹⁰*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 732 (1971).

¹¹*Long Island Railroad Company v. United States*, 318 F.Supp. 490, 498 (1970).

cluding a pre-hearing conference, an oral hearing in Washington, and, perhaps, regional hearings.¹⁰ The hearings were never held. Instead, the Commission abruptly handed down an order which purported to be an "interim report,"¹¹ but which, as a practical matter, was the same order in all material respects as the final order, the one under attack here.

Commissioner Bush said, in the "interim report," that while the majority had handled the proceeding "in an expeditious manner," incentive charges couldn't be prescribed "until a hearing has been held as contemplated by statute."¹² Again, no such hearing was held.

This is important. In spite of the fact that the Commission's 1967 decision acknowledged the fact that operating practices would *not* be improved by the incentive charges,¹³ a conclusion noted in the "interim report,"¹⁴ the Commission, without any oral hearing, handed down its "interim report" based only upon some railroad-submitted data sheets which did not relate to the question of improved operations and which could not have refuted the earlier conclusion. That statistical material, plus some figures boldly said by the Commission to have been obtained from outside of the record, was used by the Commission in reaching its conclusion to try the incentive method, anyhow.¹⁵

Upon seeing the surprising "interim report," the Seaboard Coast Line and others sought sufficient time to assess its effect and to comment upon it, but time was denied.¹⁶

¹⁰Notice of Proposed Rulemaking. See Appendix A to this Appellee's Complaint below.

¹¹*Incentive Per Diem Charges—1968*, 337 I.C.C. 183.

¹²*Id.*, page 194.

¹³*Incentive Per Diem Charges*, 332 I.C.C. 11, 16.

¹⁴*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 185.

¹⁵*Id.*, pages 187-189.

¹⁶*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733 (1971).

The Seaboard Coast Line sought a hearing," and that, too, was denied.

B. An Oral Hearing Was Required

If this Appellee understands the position of Appellants at pages 15 and 18 of their Jurisdictional Statement, the latter chide the lower court for speaking in terms of "cherished procedural rights"; tell this Court that the *Long Island* decision said an oral hearing was not required in this proceeding; and concludes that this Court should overrule the lower court because the ICC should not "waste time on applications that do not state a valid basis for a hearing."

Responding, the Seaboard Coast Line points out that until Congressional pressure was applied against the ICC on behalf of midwestern grain shippers, the Commission, as was shown, had every intention of holding oral hearings at which carriers from each section of the country could express and protect themselves. As the Seaboard Coast Line reminded the Commission upon being served with the "interim report,"¹⁸ as late as March 1969 the present Chairman of the Commission acknowledged that "[t]he statute requires a full hearing for determining whether incentive per diem should be imposed." And the Commission's Chairman told a Senate subcommittee on May 13, 1969, that hearings were yet to be held.¹⁹

Section 1(14)(a) of the Interstate Commerce Act, under which the Commission has prescribed the questioned in-

¹⁸Id., pages 735, 736. Also, see *Incentive Per Diem Charges*—1968, 337 I.C.C. 217, 219, particularly footnote 2.

¹⁹*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 735 (1971).

²⁰*Long Island Railroad Company v. United States*, 318 F.Supp. 490, 493-494 (1970).

centive charges, states, at the very beginning, that the Commission may not act until "after hearing."

Section 553 of the Administrative Procedure Act (APA) permits the Commission to engage in rulemaking "with or without opportunity for oral presentation" *unless* the proposed rules "are required by statute to be made on the record after opportunity for an agency hearing." If the statute requires a hearing, as does the involved Section 1(14)(a), then Section 553 provides that Sections 556 and 557 of the APA apply instead of Section 553.

Section 556 of the APA provides that, in rulemaking, the Commission may "adopt procedures for the submission of all or part of the evidence in written form" if "a party will not be prejudiced thereby." While the Commission went outside of the record here for some of the evidence used in reaching its conclusions, the Commission did use the "written form" approach in that it required the railroads to submit described sampling data. Appellee will show how it was prejudiced by that approach.

First, though, although the lower court did not comment on this point, the Seaboard Coast Line urges that it did not need to show prejudice, however, because Section 556 of the APA also provides that the parties "are entitled" to certain rights, whether they are prejudiced or not, and one of those rights is to "such cross-examination as may be required for a full and true disclosure of the facts."²⁰ Had the Com-

²⁰*Long Island Railroad Company v. United States*, 318 F.Supp. 490, 498 (1970), does not agree with this Appellee on that point, but that court failed to consider all of Section 556 of the APA. The only reason why Judge Friendly did not agree with The Long Island Rail Road that, at least, the Commission should have held oral hearings to test the Commission's evidence, was the Long Island Rail Road's failure to have "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony." But, that is not what the APA says; it gives the parties the positive right to cross-examine and to rebut. For example, 2 Davis, Administrative Law §14.15.

mission worked in the open in this proceeding, as it normally does, and had it made the proposed incentive per diem rules available to the railroads for proper study and subsequent cross-examination of those persons responsible for whatever "evidence" was developed by the Commission's staff, it is likely that the Seaboard Coast Line would not be before this Court.

Even if this Appellee does not have a right to cross-examine, its statement to the Commission of March 17, 1970,²¹ was specific as to points which it wished to test at a hearing.

The Seaboard Coast Line's argument as to the need for a full hearing clearly could not be said to have surprised the Commission because, in the 1967 decision, after noting that it must "exercise extreme caution," the ICC itself said:

"There is a substantial difference, however, between the information which warrants the issuance of orders requiring the movement of empty cars to an area of current scarcity and that which will support an order for the payment of funds by and between the respondent railroads. Section 1(14)(a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 USC § 551, et seq."²²

This was nothing new to the Commission, for, in acting under Section 1(14)(a) of the Act in the past it consistently afforded oral hearings. In addition to the only other incentive per diem proceeding under the 1966 amendment, there

²¹*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733-737.

²²*Incentive Per Diem Charges*, 332 I.C.C. 11, 14.

were many such cases under Section 1(14)(a) prior to the amendment.²³

In two of its decisions²⁴ the Commission appears to support our definition of the words "agency hearing" as used in Sections 553, 556 and 557 of the APA. At page 606 of *National Trucking* it said:

"The word 'hearing' is not specifically defined in the procedure act, but it is clear from the manner in which that term is used therein that the reference is to oral hearings only and not to proceedings conducted under the Commission's shortened or modified procedure."

In *Reliance*, it went on to verify the right to test evidence by cross-examination, and then cited two decisions of this Court, *Louisville* and *Morgan*.²⁵ The Commission took the position in *Louisville* (93) that it could act on data collected by it "even though not formally proved at the hearing." This Court wouldn't agree, saying:

"But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."

* * *

²³A few out of many are *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969); *Chicago, B. & Q. R. Co. v. New York, S. & Western R. Co.*, 332 I.C.C. 176 (1968); *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659 (1947); *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.*, 248 I.C.C. 109 (1941); *Rules for Car-Hire Settlement*, 165 I.C.C. 495 (1930); *Marcellus & Otisco Co. v. N.Y.C.R.R.Co.*, 104 I.C.C. 389 (1925); and *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923).

²⁴*Reliance Steel Products v. Baltimore & O.R.Co.*, 291 I.C.C. 695 (1954); *National Trucking & Storage Co., Inc. v. Pennsylvania R. Co.*, 294 I.C.C. 605, 606 (1955).

²⁵*Interstate Commerce Com. v. Louisville & N.R.Co.*, 227 U.S. 88 (1913) and *Morgan v. United States*, 304 U.S. 1 (1938).

"The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties."

* * *

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown, but presumptively sufficient information to support the finding."

Later, in its *Morgan* decision (page 14) this Court confirmed the need for "a fair and open hearing" by pointing out:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important govern-

mental process. Such a hearing has been described as an 'inexorable safeguard.' "

In *Ohio Bell*²⁴ this Court pointed out, very clearly, that not only is there a right to a fair hearing, but that "[t]here can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay." Then, citing *Morgan*, this Court said in *Willner*.²⁵

"Those who are brought into contest with * * * Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Just why the Commission should have conducted a full hearing in this case, as required, and the mistakes which can result when a major decision such as *Incentive Per Diem*—1968 is concocted somewhere within the recesses of the Commission, will be discussed later. First, however, the Seaboard Coast Line requests the Court to consider the Commission's argument that its handling of this proceeding did not prejudice appellees.

C. Prejudice Was Alleged and Shown

Suggesting that a question of first impression might be involved, the Commission urges that the meaning of the term "prejudice" is not known.²⁶ But, whatever it means, the ICC asserts that the Seaboard Coast Line did not prove

²⁴*Ohio Bell Teleph. Co. v. Public Utilities Com.*, 301 U.S. 292, 304-305 (1937).

²⁵*Willner v. Committee on Character & Fitness*, 373 U.S. 96, 105 (1963).

²⁶Jurisdictional Statement, page 17.

it would be harmed."²⁰ On the other hand, the Seaboard Coast Line has urged from the beginning that it was prejudiced by the Commission's failure to hold a full hearing. And, the court below, concluding that the factual situation in this case was quite different from that in the *Long Island* problem, agreed that the Seaboard Coast Line and the FEC were prejudiced by the summary procedures of the Commission.²¹

It does not speak well of the Commission to come to this Court and, as a principal basis for its appeal, seriously argue that there is a need to have the Court define the word "prejudice." Its meaning is clear. *Corpus Juris Secundum* puts it well:²²

"As a verb, the word 'prejudice' is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair; to cause any harm or damage or loss to; to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause; to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question." [Reference numbers omitted.]

All of the points noted in that definition apply here, and it cannot be argued earnestly that the above, or other existing definitions, need further refinement.

A party is prejudiced, or aggrieved, when a right is invaded by the act complained of and, as a result, the party suffers a loss.²³ Prejudice under the APA means the ex-

²⁰*Id.*, pages 15-17. For the purpose of this Motion only, Appellee accepts, but does not admit, that it had the burden of proving prejudice. Also, Appellee will not comment in this Motion upon the ICC's own responsibility to consider and avoid prejudicial action.

²¹*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 728.

²²72 CJS 481.

²³*Glos v. People*, 102 N.E. 763, 766 (1913).

periencing of undue difficulty in protecting an interest." The test should be whether the complaining party had a fair opportunity to defend its position.³⁴

There was no fairness here. As the *Long Island* court pointed out,³⁵ the facts from which the Commission reached its conclusion were based upon "current data" obtained during "an investigatory-research program" from "sampling procedures developed and administered by our [the ICC's] staff." On the basis of data developed internally, the Commission issued an "interim report," following which, after a decent period of time during which parties were given their only opportunity to comment, it solemnly confirmed its "interim report." In view of the determined way in which the ICC proceeded, perhaps it is true that it was "extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order,"³⁶ as the ICC now admits to this Court. There was then, and is now little doubt that the "interim report" was to be, in reality, the ICC's ultimate decision. But, even if the ICC had sufficient information upon which to base that "interim report," which it did not have, the Seaboard Coast Line at least was entitled to try to change the Commission's mind, and it was entitled, as it asked,³⁷ to try to test some of the unexplained conclusions in the "interim report." Without that opportunity it was harmed, or, as the statute says, prejudiced.

³³Compare *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (1969).

³⁴*Ibid.*

³⁵*Long Island Railroad Company v. United States*, 318 F.Supp. 490, 493.

³⁶Jurisdictional Statement, page 15.

³⁷*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733, 736.

In many ways this prejudice goes back several years, and it is pertinent, Appellee believes, to consider the Commission's past attitude with respect to car ownership by the railroads.

As the record in this case now shows, several years ago, on April 26, 1962, in Philadelphia, an ICC Commissioner, noting that a shipper should not be made to "fit his products into a few basic types of cars, such as box, gondola, and flat cars," quite properly recognized the need for "cars to meet shippers' specialized needs," and he remarked that "[r]ailroads are realizing the possibilities inherent in specialized equipment for affording more attractive service to shippers." Then, in the very year in which it handed down its "interim decision" the Commission expressed the same feeling when, in speaking of the equipment demands of shippers, it said:

"The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying."

It went on to say:

"One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines,

is apparently being ignored. Such a situation we find to be unconscionable and one that must not be continued."²⁸

When the then-Chairman of the Commission testified before the Senate's Committee on Commerce on April 7, 1965, with respect to the enactment of Section 1(14)(a), he pointed out that "each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in numbers to protect the loadings it originates."

Until the surprise service of the "interim report," the Seaboard Coast Line had every reason to believe that it could rely upon past Commission-stated objectives and upon its own business requirements with respect to car types. Nor had the Seaboard Coast Line been warned otherwise in the first Commission decision under the 1966 amendment to Section 1(14)(a) of the Act. In fact, the Commission emphasized in the 1967 decision that in many respects "the standard boxcar has been replaced."²⁹

After the 1967 decision, the Commission commenced a new study leading to the decision which is under attack here. That study consisted of sampling data, only, which the railroads were required to submit to the Commission for an 11-month period in 1968. Based upon that data, as well as material from the Internal Revenue Service obtained from outside the record, and, possibly, other information not known yet to the Appellee, the Commission established the incentive payments which are the subject of this proceeding. This was all done without oral hearings and without any real knowledge on the part of the railroads as to what the Commission was doing. Appellee wanted, but was never

²⁸*Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 286, 287 and 290.

²⁹*Incentive Per Diem Charges*, 332 I.C.C. 11, 15.

afforded, the opportunity to cross-examine the only persons, Commission personnel, who could be tested as to the sampling data which apparently formed the basis of the ICC conclusions.

Under the Commission's order, the railroads are required to make payments which range upward to \$12.98 a day, but the incentive payments are to be made for plain boxcars only. At no time during the course of the Commission's study was the Seaboard Coast Line even aware of the Commission's inclination to restrict the incentive payments to plain boxcars. In fact, in its so-called "interim report," which as a practical matter, was the final order too, the parties, for the first time, learned this fact:

"We limit our discussion to plain boxcars. The problems in other areas may well be as severe, but their magnitude is not. The size of the national boxcar fleet vis-a-vis other types of freight cars persuades us that boxcars require our separate attention. Our study of other types of cars continues."⁴⁰

So, after telling us in various ways for some time that the railroads should tailor their car fleets to suit the needs of the shippers on their lines, the Commission's order, entered without any effective opportunity to rebut it, penalizes the Seaboard Coast Line for following the Commission's admonition. That is, most of the new cars which the Seaboard Coast Line have acquired have been-equipped to meet the needs of its shippers; those cars are boxcars, but they are more expensive to own and more costly to maintain than plain boxcars. Now the Seaboard Coast Line is to be punished because it does not have sufficient unequipped cars of the type which other railroads need to meet the requirements of their shippers. This comes about because

⁴⁰*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198.

the Commission's order applies only to unequipped, plain boxcars. When a plain boxcar from another railroad is on the lines of the Appellee, the latter will pay an incentive; when the Appellee's equipped boxcars are on the lines of the other carrier, often performing the same service there as plain box cars, the Seaboard Coast Line receives no incentive in return.

Thus, as a result of the application of this order to a specific type of boxcar only, the Appellee will pay more in incentive charges than it will receive. In fact, it will pay a great deal more. Its damage—its net loss—for the six-month period of each year during which incentive per diem will be in effect will be some \$1,850,000.

After the Commission's "interim report" was handed down, the Seaboard Coast Line asked for time in which to assess the effect of the decision, and it sought a hearing to show the harm which the order would cause to its equipment program. Both requests were rejected summarily by the final Commission order, the one now under attack.

It is untrue, as the Commission now has told this Court, that "Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased."¹ The Seaboard Coast Line's statement, to the contrary, clearly told the Commission what was unexplained in its "interim report" and stated some of the things which needed to be tested at an oral hearing.

Regardless of what the Commission now says, had the Seaboard Coast Line had an opportunity to cross-examine, and explore, the reasoning behind the Commission's report and order, Appellee feels that it would have been able to convince the Commission that the record did not support its conclusions. It did not have that opportunity and, thus, it was prejudiced.

¹Jurisdictional Statement, page 8.

The principal mistake made by the Commission in its order, that is, the conclusion that boxcars would be returned quicker to the owning lines if some incentive over the basic per diem could be applied, would have been avoided had there been a hearing. This Appellee can make that statement in a positive manner because there is nothing in the Commission's record to support the Commission's conclusion. Indeed, so far as Appellee is aware, most, if not all, of the evidence of record is to the contrary. Any hearing would have developed the fact that incentive charges could not induce the Seaboard Coast Line to return cars faster than it does at present.

When the Seaboard Coast Line asked the Commission for a hearing in its statement of March 17, 1970,⁴² it pointed out that the Commission's "interim report" had expressed a desire to "produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars." Appellee has been diligent in acquiring equipment to meet the needs of its shippers, and is a creditor road, yet the Commission's order will penalize the Seaboard Coast Line and will not send to it any "flow of funds." Instead, when it had its only opportunity to comment upon the "interim report," the Seaboard Coast Line pointed out that its necessarily-hasty study showed that it will lose "in excess of \$1.5 million each year as a result of the Commission's 'experiment,' to the detriment of its car supply program." As soon as the Seaboard Coast Line's studies were completed, it learned that its annual loss would be in the amount of \$1,850,000. The Commission's mistaken belief that such a creditor line as the Seaboard Coast Line would benefit from any "flow of funds" could have been avoided if the usual safeguards had been

⁴²*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 735.

taken. We cannot believe it "unlikely" that the Commission's conclusions would have been different if someone at the ICC had been tested on cross-examination about that vital point.

Further, it is clear from a reading of the Commission's decision that shipper and carrier interests in the Southeast (that part of the country referred to by the Commission in its report as Zone 3) received no real consideration in this proceeding. As we already have pointed out, the Commission confined itself to the plain boxcar needs of the Midwest, acknowledging that "problems in other areas may well be as severe," but concluding that it would continue its study in the other areas until some other time.⁴³ The Seaboard Coast Line very carefully called the Commission's attention to that flaw, and Appellee was prejudiced by the fact that the Commission overlooked it in its final treatment of the problem. Since the Commission would have had to face careful examination on that point at an oral hearing, Appellee asserts that the lack of such a hearing on a point about which only the ICC's representatives could answer questions, was damaging to the Seaboard Coast Line. That failure would have been remedied by a full hearing. And, it is not enough for the Commission to suggest that it will conduct some future study insofar as other railroads are concerned because, while that study is going on, the Seaboard Coast Line's car supply program will suffer and its financial position will be eroded.

As Appellee told the Commission in its Statement of Position, the lack of time and proper hearing placed us "before the Commission without a real chance to present detailed verified statements."⁴⁴

⁴³*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198. By "other areas" the Commission appears to mean "other types of cars."

⁴⁴*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733.

Then, although its 1967 decision emphasized the fact that "[s]hipper need, demand and acceptance with respect to future equipment is a significant factor" to be considered, and that there should be "a thorough analysis of services" desired by shippers,⁴⁸ the ICC here refused Appellee's request that evidence of shipper needs be brought before the Commission.⁴⁹

If then, as the ICC argues, it is necessary that Appellee show that it was prejudiced by the procedure followed by the Commission, ample damage was shown to the Appellee at each juncture of the Commission proceeding.

D. There is No Conflict with Long Island

As to one of the two "substantial questions" said to have been raised by the decision under attack, the Appellants say that: "The decision of the Florida court is in basic conflict with the decision of the New York Court in Long Island Railroad Co." and that this Court "should resolve the conflict for the guidance of the Commission and other agencies
***"⁵⁰

This question illustrates the slim reed which supports the Commission's presence before this Court.

The lower court in *Long Island* noted that the incentive per diem question had come to it on a restricted stipulation related only to procedure.⁵¹ It agreed with the Long Island Rail Road that "the third sentence of §553(c) [of the APA] was applicable," thus also agreeing that an oral hearing and cross-examination is required except that the ICC may, to

⁴⁸*Incentive Per Diem Charges*, 332 I.C.C. 11, 14-15.

⁴⁹*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 736.

⁵⁰Jurisdictional Statement, page 14.

⁵¹*Long Island Railroad Company v. United States*, 318 F.Supp. 490, 491.

use the language of §556(d), "adopt procedures for the submission of all or part of the evidence in written form" if "a party will not be prejudiced thereby."⁴⁹

The District Court in New York then went on to say that:

"If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case. Instead the Long Island's request for an oral hearing was silent as to any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal."⁵⁰

The New York court said, further, that:

"* * * we fail to see that prejudice has been established."⁵¹

And, beyond that, it said that other questions:

"* * * are not before us in light of the stipulation of the parties limiting the issues."⁵²

The New York court concluded:

"Our sole task is to determine whether under all the circumstances the denial of an oral hearing significantly prevented the Long Island from fairly presenting its case."⁵³

Turning, now, to the Jacksonville court which heard the proceeding before this Court, it looked carefully at "the able

⁴⁹Id., pages 497-498.

⁵⁰Id., page 499.

⁵¹Id., page 500.

⁵²Ibid.

⁵³Ibid.

opinion" of the New York court which had "concluded that the plaintiff railroad had shown no prejudice from the procedures utilized by the Commission," and concluded that "the facts of the instant case fall within the exception expressed in *Long Island*."⁸⁴ It went on to say that the facts here, which it heard in detail, "demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission."⁸⁵

The New York court said that prejudice should be shown, and that the Long Island Rail Road had not done so. The Florida court said that prejudice should be shown, and that it had been shown by the Seaboard Coast Line and the FEC. There is, then, no conflict.

E. The Commission's Experiment Has Not Been Disrupted

On page 5 we noted that the Jurisdictional Statement raised two "substantial questions," one being that there was a conflict below with *Long Island*. Appellee believes it has shown that there is no conflict. The second "substantial question" which was raised relates to the ICC's argument that "the decision below threatens to disrupt the entire national plan before it has been given a fair trial."⁸⁶

The Commission makes that statement, but it never tells this Court why its "experiment" will be disrupted. The reason why it fails to follow through is the fact that the incentive per diem trial continued to operate through the entire planned 1970-1971 period as to all railroads except the two Appellees. There was no disruption.

In any event, the Commission has no right to try out a costly experiment which can harm the transportation sys-

⁸⁴*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 728.

⁸⁵*Ibid.*

⁸⁶Jurisdictional Statement, pages 13-14.

tem, as well as individual carriers, without evidence, properly tested, that such a plan is just and reasonable.

F. The Commission Failed to Comply with §1(14)(a) Requirements

The lower court passed over this issue in its consideration of the Commission's decision because it found the ICC to be wrong in its procedural handling of the case. We renew the point.

Because the Commission limited its consideration in this proceeding to plain boxcars while acknowledging that "problems in other areas may well be as severe,"⁸⁷ and because it refused to attempt to resolve related issues concerning the national freight car supply,⁸⁸ this Appellee has urged that the ICC ignored the requirements of Section 1(14)(a) of the Interstate Commerce Act.

The Commission recognized the limitations of Section 1(14)(a), and its own responsibility in acting under that provision of the Act, in its 1967 decision. It said:

"Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. We have observed that the adequacy of the national freight car fleet depends upon the interplay of a number of factors, none of which can be said to be of superior importance. Further, since the effect of an incentive charge must be produced over a future period, consideration must be given to possible changes in these factors. In recent years many innovations and

⁸⁷*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198. By "other areas" the Commission appears to mean "other types of car."

⁸⁸*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 223.

improvements have taken place in car design and operation."

* * *

"Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor."⁵⁰

Under pressure from Congress those responsibilities, and those factors, recognized in 1967, were sidetracked here.

i. The Order Is Arbitrary, Not Reasonable.

The very first admonition of Section 1(14)(a) is that any prescribed rule, regulation or practice must be "reasonable." The requirements prescribed in the decision now under attack are considerably less than reasonable, a fact which could have been made plain to the Commission had a hearing been conducted. Appellee sought to be heard for,

⁵⁰*Incentive Per Diem Charges*, 332 I.C.C. 11, 14-15.

among other reasons, the purpose of explaining to the Commission why its rules would be harmful to the railroad and why, in turn, they would result in a worsening of the car supply situation with respect to Seaboard Coast Line shippers. It was not reasonable for the Commission to give "first priority to the boxcar"⁶⁰ without giving consideration to all types of boxcars, many varieties of which serve the same purpose. Indeed, the Commission made that clear in its 1967 report.

Nor did the Commission give consideration to the "services currently desired by the shipping public" in the Southeast, or to "the interplay of a number of factors" of which it spoke in its 1967 decision. Instead, it handed down an arbitrary requirement which failed to consider other than a limited number of factors.

Then, Section 1(14)(a) requires that any rule with respect to "the compensation to be paid" also must be reasonable. Although this Appellee questioned the scale of incentive charges prescribed by the Commission, the ICC has yet to indicate that the various levels of incentive charges are based upon good reason. We are, of course, pleased that the Commission recognizes that the level of the charges is questionable and that the proceeding will remain open for new information as experience is gathered,⁶¹ but the Commission's conclusion clearly is not reasonable. It is not enough to say that the charges are placed at the present arbitrary level in order to give owners of unequipped boxcars "returns on investment * * * comparable to the higher average returns earned by non-regulated corporations."⁶² Aside from the fact that the Commission stated that it reached this conclusion on untested data from beyond the

⁶⁰Ibid.

⁶¹*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 225.

⁶²Id., page 224.

record, there can be no good reason why investments in unequipped boxcars should receive higher rates of return than those in equipped boxcars or in other types of rail equipment.

ii. The National Car Supply Was Not Considered.

Section 1(14)(a) requires that the Commission "give consideration to the national level of ownership of such types of freight car *and* to other factors affecting the adequacies of the national freight car supply." The Commission gave consideration to the "level of ownership" of a type of freight car, plain boxcars, but it did not do so on a "national level." For example, in reporting the results of the freight car study which it had conducted, the Commission indicated that it had studied only zone 2 and zone 4 carriers.⁶⁸ Appellee is primarily a zone 3 carrier, and little, if any, consideration was given to its territory. The national level was not even considered so far as we can determine from the Commission's decision.

iii. Other Necessary Factors Were Not Considered.

There was another very important omission by the Commission. The statute requires not only that the ICC consider the national level of ownership of—in this case—plain boxcars, but it also must consider "other factors affecting the adequacy of the national freight car supply." Proper consideration was not given to such "other factors," particularly to the impact of the new Commission requirements on the supply of equipped boxcars or on other types of equipment. And, there was no thought given to "the extent to which the transportation service [one type of car performs] is or can also be provided by cars of other types," to use the Commission's words from its 1967 decision.

⁶⁸*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198-202.

Then, the last sentence of Section 1(14)(a) appears to require that the Commission shall apply incentive charges to all types of freight cars unless it finds certain types to be adequate. The Commission seeks to meet that requirement of the Act by saying, only, that "[r]ailroad cars other than boxcars are not here found to be in short supply."⁴⁴ Other than that, there is no specific finding by the Commission. Nor could the Commission make one; for, as it said, consideration was given only to plain boxcars. And, it admits that its study is incomplete, saying that it must in the future look to see whether other types of freight cars are interchangeable with plain boxcars.⁴⁵

iv. The Commission Ignored Its Own Views of the Involved Statute.

To summarize, it is clear that the Commission used Section 1(14)(a) as a vehicle for meeting Congressional, and other, complaints with regard to a limited problem. It failed to take a national viewpoint, and it ignored the effects of its rules on the freight car supply in other segments of the country. Indeed, it ignored its own 1967 admonition:

"Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. They cannot be founded in conjecture and this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously."⁴⁶

Because the Commission did act capriciously, and because the order under attack does not comport with the require-

⁴⁴*Incentive Per Diem Charges*—1968, 337 I.C.C. 217, 228.

⁴⁵*Ibid.*

⁴⁶*Incentive Per Diem Charges*, 332 I.C.C. 11, 16-17.

ments of Section 1(14) (a) of the Act, it might well be set aside by this Court for reasons other than those announced by the court below.

G. There are Neither Reasons Nor Findings Sufficient to Support the Commission's Conclusions

This is another of the Seaboard Coast Line's grounds for reversal which the lower court found unnecessary to consider.

Some years back, this Court said, in *Louisville*,⁹¹ that:

"A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.'"

That has been a consistent requirement throughout the years. It was made clear in *Burlington* and this Court went on to state that:

"Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"⁹²

There are a number of conclusions in the Commission's report which are not, and cannot be, supported by either reason, evidence or findings of record.

⁹¹*Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U.S. 88, 92 (1913).

⁹²*Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962). Also, annotation references 2 and 3 in the *Burlington* decision as reported in 9 L.Ed. 2d 207. Particularly strong is *Aberdeen and Rockfish Railroad Co. v. United States*, 270 F.Supp. 695 (1967), *aff'd. Baltimore & O.R.Co. v. Aberdeen & R.R. Co.*, 393 U.S. 87 (1968), and *Palmer v. United States*, 75 F.Supp. 63, 75-76 (1947).

It has been said, correctly, that:

"It is not enough that some suggestion of a reason should 'lurk' in the Commission's report; a reviewing court cannot uphold an order on a ground which the Commission has not made sufficiently plain that the court can be sure the Commission meant to act upon it and had a factual basis for doing so."⁶⁹

The most glaring error in the Commission's entire decision relates to the principal objective of incentive per diem charges, it being the purpose of those charges to spur the railroads into returning boxcars to the owning lines as quickly as possible, and to the Commission's failure to make clear why it now has reversed its 1967 conclusion in that regard.

*i. Incentive Charges Will Not Improve
Operating Practices.*

In its 1967 report, the Commission made clear that it was "not satisfied, on this record, that addition of an interim incentive charge" would have such an impact as to improve present operating practices.⁷⁰ Later, it acknowledged that conclusion in the proceeding now being considered.⁷¹ Nevertheless, without any facts of record to bolster its new conclusion, and without stating in the decision its support for the conclusion, the Commission turned itself about and surmised that incentive per diem "should tend to speed up the use and movement of cars."⁷² If, as we charge, this conclusion of the Commission cannot be supported by evidence of record, then the entire order must fail because its underpinnings are gone and it will serve no reasonable

⁶⁹*New York Central Railroad Co. v. United States*, 207 F.Supp. 483, 496 (1962).

⁷⁰*Incentive Per Diem Charges*, 332 I.C.C. 11, 16.

⁷¹*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 185.

⁷²*Id.*, page 186.

purpose. Rather, it will only take money from the paying railroads and give it to the owners of plain boxcars, all to the detriment of the users of equipped boxcars and other types of rail equipment.

This Appellee is of the opinion that all of the evidence of record on this subject now before the Commission requires a conclusion that incentive per diem charges will *not* improve the operating practices of the railroads. If this is correct, that is, if the evidence indicates that the disputed incentive charges will not serve the purpose for which they are prescribed, then the order cannot stand.⁷³

ii. *The Charges Will Unduly Burden the Seaboard Coast Line.*

The Commission figured that its proposal was worth trying because, after all, "the proposed charges would [not] impose an undue burden on [any railroad opponent] or on any group of carriers."⁷⁴ This conclusion is not, and cannot be, supported.

Although the Seaboard Coast Line was not given an opportunity to show the full scope of the loss which it would experience, it did give evidence that it would lose "in excess of \$1.5 million" for each 6-month period that the disputed scale of charges is in effect. Other railroads, including the FEC, showed that the proposed charges would be harmful. Regardless, of the showing made by others, the loss which will be experienced by this Appellee constitutes an "undue burden," and any conclusion to the contrary is faulty and without support.

In its only direct response to any Seaboard Coast Line objection, the Commission said that the Seaboard Coast

⁷³*Nebbia v. New York*, 291 U.S. 502, 525 (1934).

⁷⁴*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 224, footnote 8.

Line is not going to be penalized for owning better boxcars because it will receive a greater basic per diem rate "when its equipped, expensive, and more modern boxcars are on other lines." "It," said the Commission of the Appeller, "overlooks the scale of basic per diem charges, which provide larger per diem payments for the more modern and more expensive cars."⁷⁵ This is a most inexpert response for an expert agency to make, for the Commission knows that basic per diem is based upon ownership costs; incentive per diem is not. Whether we're considering 40-year old, plain boxcars or brand new equipped boxcars, basic per diem returns to the owner of either kind of car only enough to meet its ownership costs. Incentive per diem is something else; it's an additional charge over and above the basic per diem rate. The Seaboard Coast Line won't receive incentive per diem for its more expensive cars, but the owners of plain boxcars will. Thus, when the netting out of interline accounts takes place, the Seaboard Coast Line will come up short—because of the Commission's order—some \$308,333 each month, or, \$1,850,000 at the conclusion of each six-month period.

Aside from the hoped-for improvement of operating practices, the only other stated purpose of the incentive charges is to penalize railroads which will not buy sufficient quantities of plain boxcars and give funds to creditor railroads which do buy them. The Commission said that the incentive charges will "produce a steady annual, although not perennial, flow of funds to the creditor per diem railroads with which they can purchase additional plain boxcars."⁷⁶ Our answer to the Commission was, and is, that the Seaboard Coast Line, acting in conformity with prior demands of the Commission and of good business practice, has been

⁷⁵Id., pages 223-224.

⁷⁶*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 186.

diligent in acquiring equipment to meet the needs of its shippers; and it is a creditor road. At the only opportunity given to it, the Commission was told these things by this Appellee." Clearly, then, the Commission's conclusion is wrong, for the Seaboard Coast Line, a creditor road, will be penalized and will not be the beneficiary of any "steady annual * * * flow of funds."

Equally erroneous is the Commission's conclusion that "the incentive charges should bring distinct economic benefits." There is something wrong with this statement on its face, because Appellee is going to have some \$1.85 million lifted from its pockets each year. So, obviously the conclusion is incorrect insofar as the Seaboard Coast Line is concerned. Nor can the finding be propped up by the extra-record support of some data obtained by the Commission from the Internal Revenue Service, as the ICC has tried. Without doubt, some railroads will experience "distinct economic benefits" as a result of the order; others will not.

Further, shippers in Seaboard Coast Line territory will suffer. The railroads of the Midwest, which need the plain boxcars for their shippers, will, under the Commission's incentive plan, receive the "distinct economic benefits" of which the ICC wrote. That is, they will obtain additional plain boxcars, those cars being paid for by the Seaboard Coast Line, among others. Since the latter must buy plain boxcars for other railroads, it must, naturally, reduce its expenditures for new cars needed by its own shippers. This is the kind of "interplay" which was so important to the Commission in its 1967 decision, but which, in its haste, it forgot in 1970.

⁷⁷*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733-736.

⁷⁸*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 190.

iii. *The Commission's Study is Incomplete.*

The decision under attack states, strangely, that "[t]he critics of the [1968] study point to no specific weakness in it."⁷⁹ This conclusion of the Commission is wrong. At every opportunity—at the beginning, in the middle, and at the end of the study—this Appellee did criticize the study as being inadequate. As noted earlier, the Commission failed to take into consideration the Southeastern States, the needs of shippers in that territory, and the type of boxcar equipment used by rail customers there. Very important, it did not consider, as it once said it must, that equipped boxcars often are used interchangeably with plain boxcars. And, in sum, it did not heed its own previously mentioned 1967 admonition that its "[c]onclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program." In fact, the only real objective of the Commission's study here was "to develop data relating to the supply and demand conditions of the railroads in the United States and their performance in satisfying such demand."⁸⁰ Numbers, not reasons, were studied. And, numbers cannot support the Commission's conclusions in this proceeding.

iv. *The Commission Ignored Material Objections.*

Then, the Commission concluded that, for the most part, those parties critical of its order, "do not raise material or substantial allegations of error in that report."⁸¹ The facts are to the contrary. It would be safe to say that virtually all of those critical of the decision raised "material allega-

⁷⁹*Incentive Per Diem Charges*—1968, 337 I.C.C. 217, 221.

⁸⁰*Incentive Per Diem Charges*—1968, 337 I.C.C. 183, 197.

⁸¹*Incentive Per Diem Charges*—1968, 337 I.C.C. 217, 220.

tions." Certainly, this Appellee did. Its allegation of substantial harm is quite material, yet it was brushed aside for the clear purpose of rushing the Commission's "experiment" into practice.

v. The Level of the Charges Has No Support of Record.

An important aspect of the Commission's decision is its treatment of the level, or amount, of the incentive per diem charges. Although it finds "that the 1968 study provides us with adequate data to support the action taken in this report and order,"⁸² the Commission confesses that the order is only a "tentative approach to the appropriate amount of incentive."⁸³ The method by which the Commission arrived at this "tentative approach" is described in the "interim report," the Commission being quite candid in stating that the basis for its conclusion is extra-record data collected by the Internal Revenue Service showing the profitability of corporations generally in 1966.⁸⁴ Aside from the fact that the Commission has gone beyond the record, the "tentative" charges bear absolutely no relationship to the proper levels necessary to meet the Commission's objective. The Commission's approach does not take into consideration the needs of all of the carriers, and it will lead to unnecessary, irreparable harm to some railroads. The Seaboard Coast Line brought this to the Commission's attention at the only opportunity which was given to the parties, but the Commission's only response was that it would wait until after "actual experience" before it would "determine the precise effect" of the decision.⁸⁵ That comment is not such "substantial evidence" as will support the far-reaching, damaging results of the order. Furthermore, the Commission's

⁸²Id., page 223.

⁸³*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 187.

⁸⁴Id., page 187-189.

⁸⁵*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 225.

statement flies directly in the face of its earlier conclusion that "before we undertake to impose the charge * * *, it is of the utmost importance that little, if any, doubt exists as to its necessity and effectiveness."⁸⁸

CONCLUSION

As Appellee said on brief below, the Seaboard Coast Line realizes that the Commission has been faced with much unfounded criticism with respect to car supply problems. And, we can appreciate fully the impact of Congressional pressure on the Commission. Still, as the court below pointed out, "procedural shortcuts" are not the answer. Too often they lead, as here, to unfair, unsupported and unreasoned conclusions of the type this Appellee has just described.

The lower court considered carefully the procedural issue, and there has been given to this Court no real indication by the Appellants of substantial need for further argument. This Motion to Affirm, accordingly, should be granted.

Respectfully submitted,

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Of Counsel:

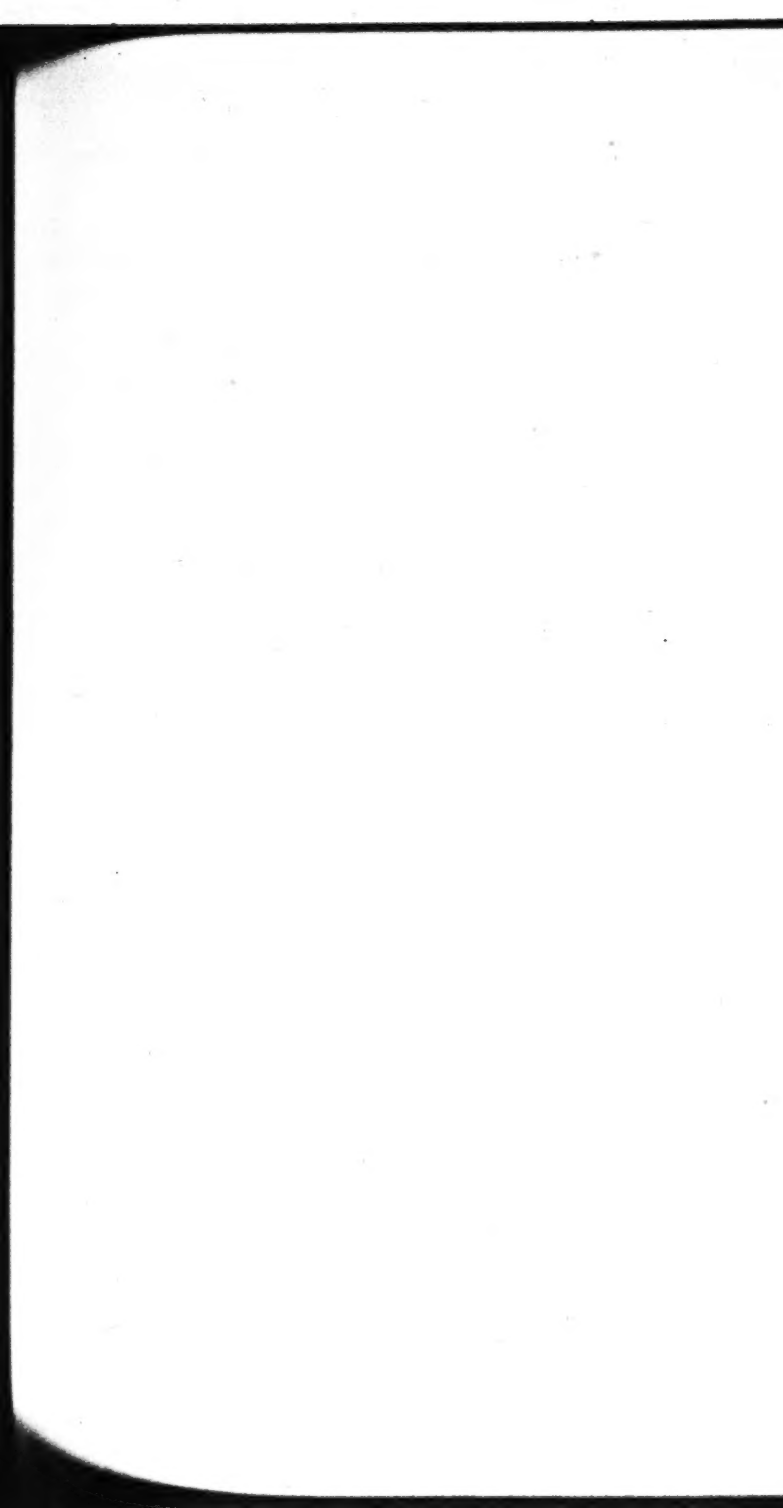
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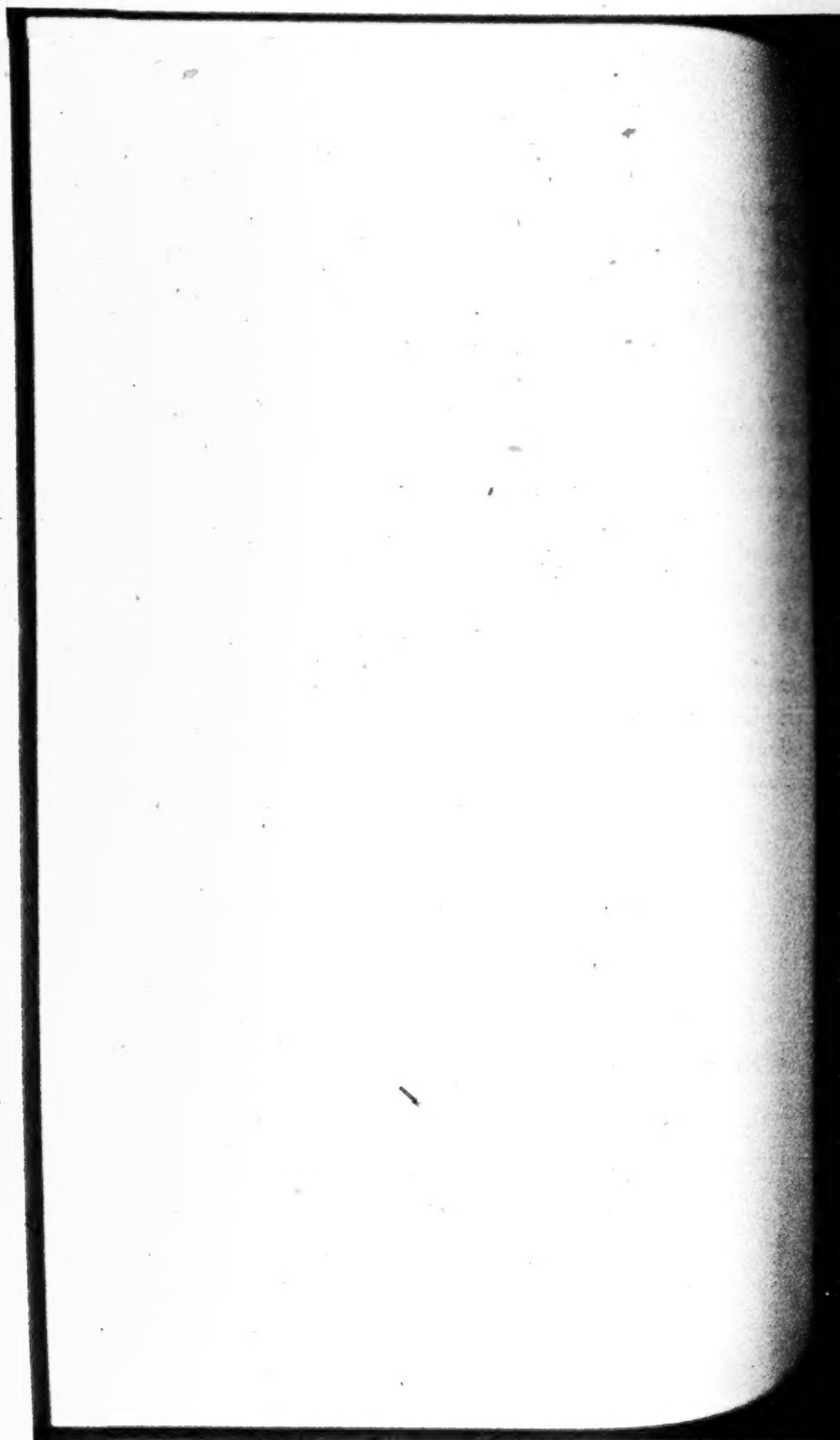
American Heritage Life Building

Jacksonville, Florida 32202

July, 1971

⁸⁸*Incentive Per Diem Charges*, 332 I.C.C. 11, 14.





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CITATIONS

CASES:

<i>Incentive Per Diem</i> , 332 I.C.C. 11 (1967)	10 n.8, 13
<i>Investigation of Adequacy of Freight Car Ownership</i> , 335 I.C.C. 264 (1969)	11, 13
<i>Long Island R. R. v. United States</i> , 318 F. Supp. 490 (E.D. N.Y. 1970)	3-4

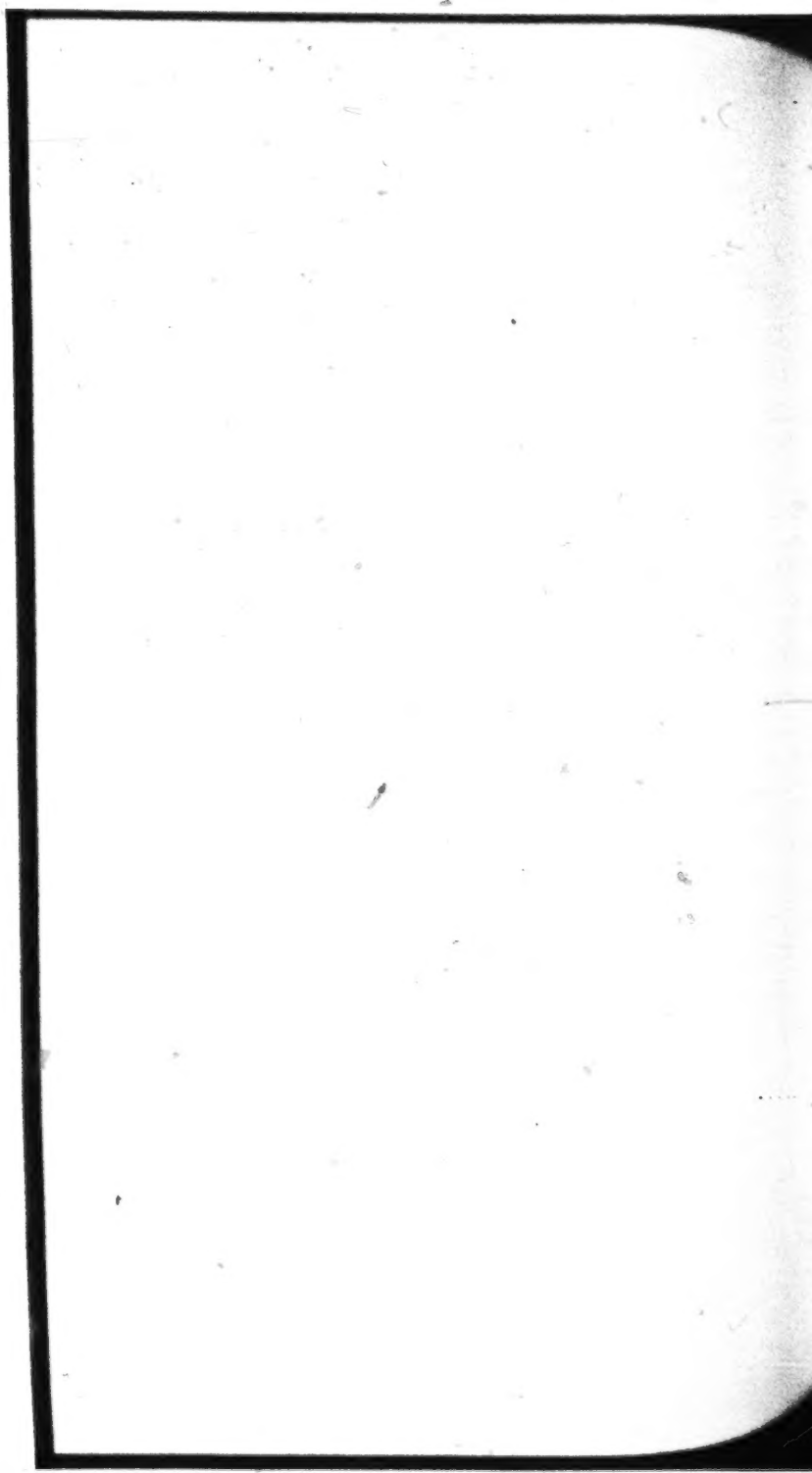
STATUTES:

Administrative Procedure Act:

Sections 556 and 557, U.S.C. §§ 556 and 5572, 4, 6

Interstate Commerce Act:

Section 1(14)(a), 49 U.S.C. § 1(14)(a) ...2, 6, 11-12, 13



IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 70-279

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY

On Appeal from the United States District Court for the
Middle District of Florida

**MOTION TO AFFIRM OF FLORIDA EAST COAST
RAILWAY COMPANY**

Pursuant to Rule 16(1) of the Rules of this Court,
Florida East Coast Railway Company moves that the
judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (322 F. Supp. 725) enjoining the application to plaintiffs below¹ of an order of the Interstate Commerce Commission requiring payment of "incentive" per diem charges, in addition to the payment of normal per diem rental, for the use of unequipped boxcars during the period September through February of each year.

The order is the product of a rule-making proceeding under section 1(14)(a) of the Interstate Commerce Act. Section 1(14)(a) authorizes the Commission to fix the compensation to be paid by railroads for the use of freight cars only "after hearing." In the administrative proceeding leading to adoption of the order, the Commission limited the evidence of opponents to the Commission's proposal for imposition of incentive per diem charges to the submission of written representations. The Commission refused the request of FEC for a hearing at which FEC proposed to produce, under subpoena, testimony of Commission employees to contradict assertions of fact relied upon to support prescription of incentive per diem charges, and to cross-examine other Commission employees with respect to the studies relied upon to support the Commission's conclusions. The Commission also denied FEC's request for oral argument.

The district court held that, since the Commission was authorized by section 1(14)(a) to act only after hearing, the Commission could not under section 556 (d) of the Administrative Procedure Act refuse a

¹ Plaintiffs were Florida East Coast Railway Company ("FEC") and Seaboard Coast Line Railroad Company ("Seaboard").

hearing and deny cross-examination if a party was prejudiced thereby. The court held that the facts of the instant case "demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission" (J.S. p. 7a). With respect to FEC, the district court pointed out that "FEC sought to disclose a number of deficiencies in the Commission's order by presentation of evidence and cross-examination of the employees of the Commission who directed and prepared the studies relied upon in reaching the Commission conclusions" (J.S. p. 8a). The court, referring to the requests of FEC and Seaboard to the Commission for hearing, concluded "Without discussing in detail the grounds there urged as requiring a hearing, we are of the clear view that these assertions demonstrate the prejudice to Seaboard and FEC arising from the Commission's failure to provide hearings" (J.S. p. 8a).²

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. This case presents a single issue: whether FEC was prejudiced by the refusal of the Commission to allow FEC to present the proffered testimony and to cross-examine Commission employees. Resolution of this factual issue by the court below did not involve application of uncertain or disputed principles of law. The issue was correctly decided by the district court and the judgment of that court should be affirmed.

1. The Government asserts a conflict between the decision below and that in *Long Island R.R. v. United*

² This disposition of the case made it unnecessary for the district court to decide other grounds upon which plaintiffs challenged the lawfulness and validity of the Commission's order (J.S. p. 5a).

States, 318 F. Supp. 490 (E.D. N.Y. 1970). Examination of the two decisions demonstrates that there is no conflict in the principles of law applied by the two courts. Both courts held that the Commission proceeding was governed by the procedural requirements imposed in sections 556 and 557 of the Administrative Procedure Act (J.S. pp. 127a-128a, 131a and J.S. p. 6a). Both held that, under section 556(d) of the APA, the procedure employed by the Commission would be unlawful if a party was "prejudiced thereby" (J.S. p. 134a and J.S. p. 6a). Both held prejudice was established if a party pointed out "any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal" (J.S. p. 136a and J.S. p. 7a). The difference in the result reached by the court below and that in *Long Island* was the consequence of the difference in the factual showing made in the two cases. In *Long Island*, the court held that the railroad had not "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony."³ It would have been, the court said, a "different case" if such a showing had been made (J.S. p. 136a). In the instant case, the court concluded that the FEC had, as a matter of fact, pointed to specifics on which cross-examination and live testimony was needed (J.S. pp. 7a-8a).

2. FEC requested hearing in order to compel testimony from the employees of the Commission who supervised and directed the study upon which the Commission relied in reaching its conclusions respect-

³ The request of the *Long Island* for hearing to which the district court refers (J.S. p. 126a) is reproduced as Appendix A *infra*.

ing the adequacy of car supply and to present the testimony of Commission employees experienced in matters affecting freight car supply. FEC's request to the Commission for hearing specified that FEC expected to establish, among others, four specific, factual points by such cross-examination and testimony.⁴

Counsel for the Government now assert that the questions FEC sought to have answered through cross-examination of Commission staff were so worded that the Commission "would readily have agreed with" each fact without changing any of its conclusions (J.S. p. 16). This argument is, as the court below correctly held, "wide of the mark." Neither Government counsel nor a reviewing court can know what facts the Commission "would" have agreed with or what conclusions it "would" have reached in the face of such testimony. The Commission itself expressed

⁴FEC's request stated, in part:

FEC expects to establish, by cross-examination of such persons, the following facts, among others:

- a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region.
- b. Railroad ownership of additional plain box cars would not necessarily change the results summarized in the appendices to the interim report.
- c. No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year.
- d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

(J.S. pp. 47a-48a)

no such reason for denying FEC's request. The Commission's report, in fact, gives no explanation whatever for denying the request for oral hearing. The Commission's report says only that "No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that [Administrative Procedure] act" (J.S. p. 87a). Moreover, FEC's burden in the reviewing court is not to establish that the evidence it proposed to produce at the oral hearing would have, if received, compelled the agency to reach contrary conclusions. FEC was entitled to a fair opportunity to develop a record to persuade the agency not to impose incentive charges, as well as a full record for judicial review of an adverse result. FEC established that it was prejudiced by the procedure requiring submission of all evidence in writing by demonstrating that the procedure precluded FEC from presenting relevant and material evidence in support of its position in opposition to incentive per diem charges.

3. In the context of the proceeding and in the light of the findings expressed by the Commission, the testimony and cross-examination FEC sought was material and relevant to the agency determination under section 1(14)(a) of the Interstate Commerce Act. The interim report of the Commission (J.S. p. 51a) proposing imposition of incentive per diem charges depended upon a conclusion that a nationwide shortage of unequipped boxcars exists during the six-month period September through February of every year.⁵

⁵ Section 1(14)(a) provides, in part: "The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate"

A study attached to the interim report prepared by the staff of the Commission was the basis for this conclusion. The study was based upon periodic reports filed during 1968 by individual railroads in response to questionnaires designed by the Commission's staff. The individual reports listed by station for selected dates the number of cars requested by shippers to be placed for loading, the number actually placed, and the number of empties at that station and at other stations on the reporting railroad. The staff study summarized the data by six geographic zones. The study claimed both a failure to fill shipper orders for plain boxcars (a deficiency) and, at the same time, a large surplus of empty plain boxcars within the same geographic zones (J.S. p. 68a). The Commission asserted that improved efficiencies in use, movement, and return of boxcars would not, in its judgment, eliminate reported deficiencies during the winter months (J.S. pp. 69a-70a). The Commission concluded that shortages "probably" could be relieved only by an increase in the total number of plain boxcars (J.S. p. 70a). The Commission concluded that the imposition of incentive per diem charges "should tend" to speed up the use, movement, and return of foreign cars, produce a flow of funds for creditor roads to purchase needed equipment, and "might tend" to encourage acquisition of additional boxcars by carriers in every part of the country (J.S. p. 54a).

The final report of the Commission adopted these findings and conclusions of the interim report (J.S. p. 88a). In affirming its interim conclusion to impose incentive per diem, the Commission disposed of a number of issues by holding that the rail carriers had the burden of proving the negative of the as-

sumptions made in the interim report and that the carriers had not discharged that burden. For example, the Commission held the railroad respondents had the burden, but had failed to present evidence to demonstrate that incentive per diem would not improve car utilization (J.S. pp. 90a, 92a); that the financial impact of incentive per diem would be unduly burdensome (J.S. pp. 92a n. 8, 101a-102a); and that the general purpose boxcar is not the "workhorse" of the fleet (J.S. p. 92a).

The testimony FEC sought to compel would have tested the validity of the study upon which the Commission relied and established facts contradicting the Commission's assumptions relating to car supply. The testimony could not have been presented by FEC in written form because the information was in the exclusive possession and knowledge of the Commission's employees proposed to be subpoenaed.

FEC proposed to demonstrate through the Commission staff that the "deficiencies" in furnishing boxcars, reported by the individual railroads and tabulated in the study upon which the Commission relied to make the essential finding of inadequate car supply, may not be affected by the number of boxcars owned by the railroad or by any regional group of railroads. The reports designed by the Commission staff required each railroad to show as a "deficiency" the failure to supply a car on the day requested by the shipper no matter when the request was received. For example, a request received at noon for a boxcar that same day would produce a reported deficiency unless the car was supplied that day (J.S. pp. 66a-67a). Train schedules and switch engine crew assignments may, and frequently do, prevent placement of a car

upon short notice even at locations served every day. Many branch lines are served only once or twice a week, but a request for a boxcar on a day that no service was scheduled would also be recorded as a deficiency. FEC proposed to show, therefore, that the reported "deficiencies" tabulated in the study were the result of train service schedules rather than lack of cars and that reported deficiencies may not be affected by the supply of cars available at a station, on a railroad, or in a statistical region. The record as made before the Commission suggests that the number of reported deficiencies because of train schedules was quite substantial.⁶ Although the Commission's Bureau of Enforcement conceded in the proceeding that orders for car placements on a day when no service was scheduled should not have been counted as orders for cars on that day,⁷ such "deficiencies" were not excluded from the reports or the study. In the absence of the requested cross-examination, there was no way to determine whether, or to what extent, the reported deficiencies were the result of inadequate car supply or service factors unrelated to car ownership. The importance of this showing, both in terms of the Commission proceeding and of judicial review of the Commission's decision, is emphasized by the Commission's reliance on any reported "deficiency" in placing cars as evidence that the railroads owned an inadequate number of plain boxcars (J.S. p. 89a).

FEC also proposed to present, on this point, testimony of Commission car service experts to show

⁶ The record in the proceeding shows, for example, that 25 to 30 percent of all stations on the Penn Central are served on less than a daily basis and that this fact affected the deficiencies reported by that railroad (Verified Statement of Andrew Weamer).

⁷ Bureau Reply Brief, p. 7.

that reports of "deficiencies" such as those used in the staff study are substantially affected by shipper practices of overordering cars or placing duplicate orders with two or more railroads, particularly during the fall and winter grain harvest in the Midwest.⁵ FEC proposed to cross-examine the service agents upon whom the Commission relied to conclude that the reports were 91.7 percent free of any "duplication or inflation in the car orders reported" (J.S. pp. 65a-66a). The accuracy of this conclusion is important because inflated, duplicative, or repetitious orders for cars drastically distort the number of reported shortages and deficiencies. The requested cross-examination would have disclosed whether the agents took into account the fact that shippers frequently "cancel"

⁵ For example, Howard S. Kline, Chief of the Open Car Branch, Section of Car Service, Bureau of Railroad Safety and Service of the Commission, had stated under cross-examination in 1966:

Q. You have indicated that you know, then, of a practice of shippers to order more cars than they actually need, to request the carrier to place more cars than they actually need, under such circumstances.

A. Yes.

• • • • •

Q. Could you test it perhaps by a sampling procedure to deal with the shippers themselves, and compare their actual shipments over a period of time with their placing of orders for the placement of cars?

A. No, because I do not think there is too much connection between the car shortages as reported by shippers, and their shipments. Our men have turned in reports any number of times of elevator men with plugged elevators, that had a siding that would hold five cars, and still they are ordering 20 cars a day. What would they do with the other 15?

(Transcript of Hearings on November 2-3, 1966 in Ex Parte 252, pp. 167, 275-276)

orders only after the day the cars are to be placed. Only cross-examination would have disclosed how, if at all, the Commission agents auditing carrier A could determine that shippers had not placed duplicating orders with carrier B. The presentation of testimony from Commission experts respecting such practices, as well as cross-examination of the audits, was neither frivolous nor without reasonable foundation. In Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969), the parties unanimously agreed, and the Commission found, that the reported car shortages in that proceeding had to be reduced at least 50 percent to compensate for over-ordering by shippers (335 I.C.C. at 305-306).

FEC requested hearing to show, also through Commission staff experts, that acquisition of additional plain boxcars by the railroads would not necessarily alleviate reported shortages and deficiencies. FEC presented evidence in its possession that increases in the number of plain boxcars would only exacerbate the imbalance of empty plain boxcars on FEC's line, resulting in decreased efficiency in car utilization and increased incentive per diem obligations (Verified Statement of R. P. Taylor, pp. 6-7). FEC proposed to show, through the testimony of Commission staff members with long experience in freight car service matters, the extent to which inefficient car utilization on a national basis would be a likely product of increased car supply. This evidence was directly relevant to the statutory duties of the Commission under section 1(14)(a) of the Act. Section 1(14)(a) authorizes imposition of incentive per diem only if the Commission finds such charges, among other things, "will . . . contribute to sound car service practices

(including efficient utilization and distribution of cars)” The only basis the Commission, as proponent of the rule, offered in its interim report to satisfy its statutory burden of finding that more efficient car utilization and distribution would evolve was an expression of conditional, qualified hope that incentive charges “may,” “should,” “might” produce this desired result (J.S. pp. 54a, 57a). But, in the end, the Commission had to concede that it did not know whether incentive per diem would work at all (J.S. p. 61a). The tack the Commission took in its final report concerning the effect of incentive per diem was simply to shift the evidentiary burden from the Commission as the proponent of the regulation to respondent railroads. The Commission held:

No evidence was produced by these parties beyond the opinions of certain railroad officials . . . that the proposed scale would be ineffective as an incentive. (J.S. p. 92a)

This conclusion by the Commission underscores the prejudice FEC sustained when the Commission refused an oral hearing at which FEC proposed to present the testimony of non-railroad witnesses on these critical issues.

FEC had reasonable grounds to believe that Commission staff members experienced in freight car supply problems would have testified that the statistics summarized in the interim report were insufficient to support a determination as to what constitutes an adequate car supply or how many additional general purpose boxcars were needed to remedy deficiencies found to exist. Mr. H. S. Kline, the Commission's expert on freight car supply, had stated in other proceedings that a supply of cars adequate to furnish all

shippers cars within 24 hours of their request would be so large that rail traffic would come to a standstill from the resulting congestion (Transcript of Ex Parte 241 Hearings, pp. 1235-1236). The Commission, in effect, reached the same conclusion in the 1967 decision in Ex Parte 252 (332 I.C.C. at 13). Yet, the standard applied by the Commission in this proceeding was even more stringent—the ability or failure of railroads to place cars for loading at the time requested even if the request for service was made on the same day (J.S. p. 89a).

FEC had every reason to believe further that responsible staff members of the Commission would have testified that it is unreasonable to measure the adequacy of freight car supply, particularly in periods of heavy grain harvests, by the ability of railroads to furnish plain boxcars upon request regardless of how preemptory the request. Responsible officials of the Commission had repeatedly stated at other times and in other proceedings that a service standard requiring placement of cars upon 24 hours' notice was unreasonable and particularly so during harvest time (*E.g.*, Transcript of Ex Parte 241 Hearings, pp. 356-358, 1234-1236; Transcript of Ex Parte 252 Hearings, pp. 256-257). The acquisition and maintenance of a "car supply adequate to meet the needs of commerce" is, under section 1(14)(a), an essential part of the standards for Commission imposition of incentive per diem. The reasonableness of the standard applied by the Commission to measure adequacy of car service is thus directly relevant to the statutory authority under which the Commission acted.

4. FEC is a small, terminating railroad operating along the east coast of Florida. The efficiency and

dispatch with which FEC now moves freight cars, including plain boxcars, are unmatched by any other railroad.* FEC has thus far avoided the financial disaster that now threatens the continued existence of railroad service on much of the eastern seaboard of the United States. The record in this proceeding shows that the incentive per diem charges prescribed by the Commission would increase the car hire costs of FEC by an amount exceeding the net railway income of FEC in 1967 and 1968 (Verified Statement of E. L. Masters, App. B; Verified Statement of R. P. Taylor, p. 3). The Commission refused to increase revenues of the terminating lines or to exempt them from payment of incentive per diem charges (J.S. pp. 100a, 103a). Faced with such a threat to its financial stability, FEC is entitled to insist upon an opportunity to make an evidentiary record to persuade the agency not to impose such charges or, if imposed, to convince a reviewing court that the Commission decision was unlawful. The decision of the court below poses no threat to any national plan to secure adequate freight car service. The incentive per diem is, in fact, in effect except as to the plaintiffs in this action. The court below has simply acted to implement the basic rights to which FEC is entitled under both the Interstate Commerce Act and Administrative Procedure Act.

* Verified Statement of R. P. Taylor, pp. 4-6, comparing FEC car mileages with other carriers.

The "car distribution directions" referred to in the Government's jurisdictional statement (J.S. p. 14) are issued by the staff of the Commission to specify the connecting line to which FEC is to deliver empty cars in order that the cars may be sent to a particular region. Under existing car service rules, FEC may return empty cars only to the connecting line from which the cars were received under load. The car service directions override these car service rules.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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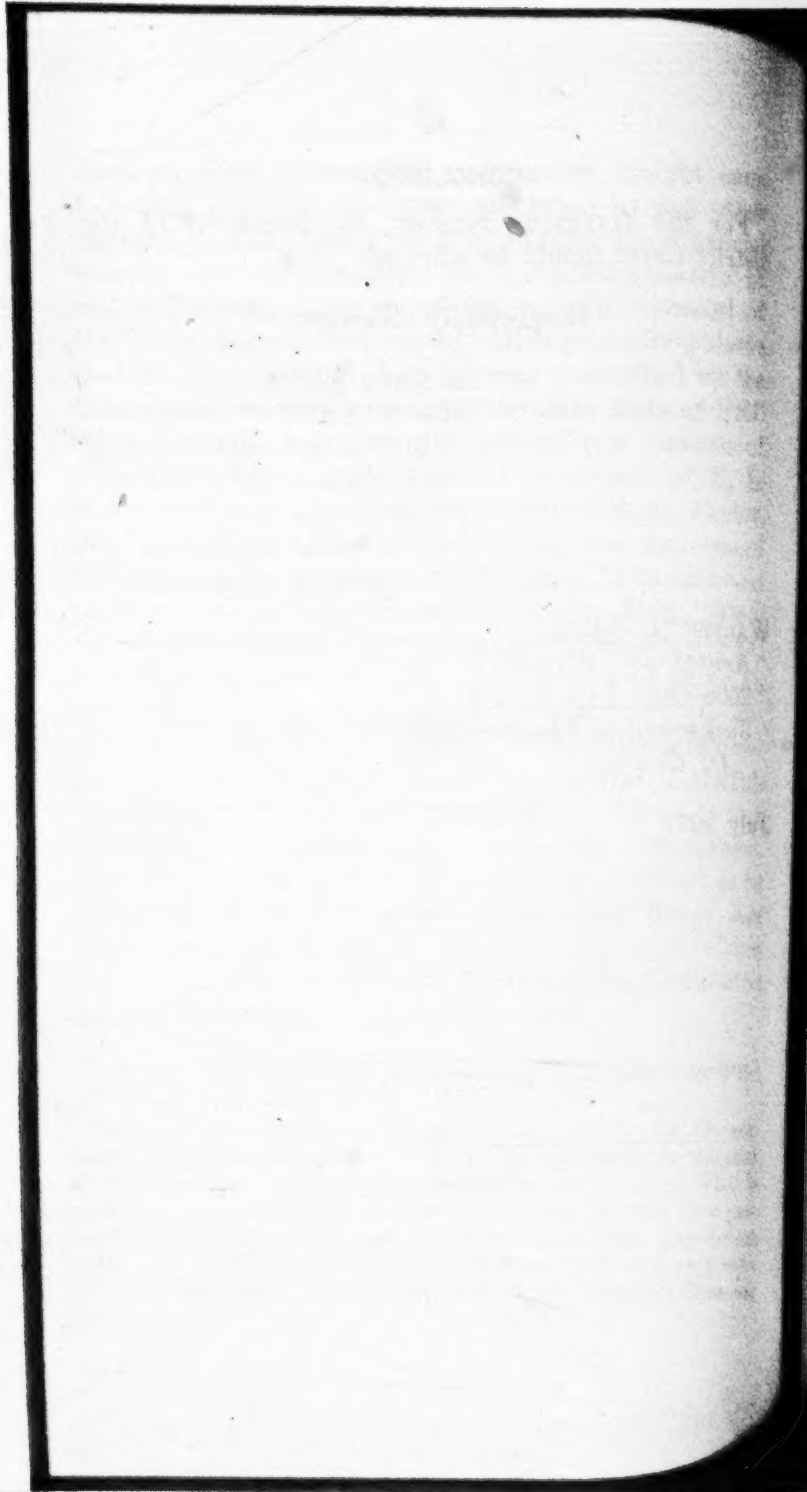
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Of Counsel

July 1971



APPENDIX

APPENDIX A

**BEFORE THE
INTERSTATE COMMERCE COMMISSION**

**EX PARTE 252 (SUB-NO. 1)
INCENTIVE PER DIEM CHARGES—1969**

**Petition of Respondent, Long Island Rail Road for Modification
of the Interim Order Dated December 12, 1969**

By an Interim Order dated December 12, 1969, in the above-captioned proceeding, the Commission, *inter alia*, proposed the prescription of "incentive" per diem rates pursuant to Section 1(14)(a) of the Interstate Commerce Act and established certain procedures for the handling of the proceeding.

The third and fourth ordering paragraphs of said Interim Order provide as follows:

"It is further ordered, that initial verified statements of facts, briefs, and statements of position in response to the said interim report may be filed on or before February 24, 1970; and that replies thereto may be filed on or before March 24, 1970."*

It is further ordered, that any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced."

Section 1(14)(a) which contains the statutory authorization for the Commission to prescribe "incentive" per

* At the request of the LIRR contained in a letter dated January 27, 1970, the above dates were changed from February 25, 1970, and March 24, 1970, to March 17, 1970, and April 14, 1970, respectively, according to telegraphic advice from J. J. Fittipaldi, Deputy Director Acting, dated February 9, 1970.

diem rates also requires the Commission to hold a "hearing" prior to prescribing such rates.

The requirement for a hearing contained in Section 1(14)(a) is binding upon the Commission and such hearing must be conducted in accordance with 5 U.S.C. § 556 and 557.

See: *Wirtz v. Baldor Elect. Co.*, 337 Fed. 518
(U.S.C.A.—D.C.—1964)

Glendenning v. Ribicoff, 213 F. Supp. 301
(W.D. Mo.—1962)

Sosna v. Celebrezze, 234 F. Supp. 289 (E.
D. Pa.—1964)

The provisions of the Administrative Procedure Act (SU: S. C. § 556 and 557) guarantee the LIRR as a matter of right an oral hearing and as a matter of statutory policy, put the burden of proof upon the Commission as the proponent of the proposed scheme of "incentive" per diem. Further, it is impossible for the Long Island Rail Road, (hereinafter the "LIRR"), to file a meaningful brief as a party respondent to this proceeding until it has had an opportunity to see the evidence it is being confronted with, crossexamine the proponents witness and rebut such evidence as it deems appropriate. Absent this, it is the LIRR's position and contention that it has been deprived of the full and fair hearing guaranteed it by § 1(14)(a) of the Interstate Commerce Act, and 5 U.S.C. § 556 and 557.

WHEREFORE, it is respectfully requested that the Commission modify its Interim Order of December 12, 1969, as already amended, so as to provide:

1. For an oral hearing to be held in accordance to the provisions of 5 U.S.C. § 556 and 557 at which hearing, witnesses on behalf of the Commission, as the proponent of the proposed rules, shall introduce the

3a

evidence relied upon by the Commission in rendering its Interim Order; and

2. Providing the opportunity for all parties respondent, including the LIRR, to crossexamine all witnesses introducing evidence in the proceeding and where deemed appropriate to submit evidence in rebuttal; and
3. Providing a reasonable opportunity following the close of such hearings to file briefs with the Commission addressed to such questions of law and fact as the parties may deem appropriate, and for such other relief as may seem just and proper.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-279

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLANTS**

v.

**FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY**

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA**

**MEMORANDUM FOR THE UNITED STATES OF
AMERICA AND THE INTERSTATE COMMERCE
COMMISSION IN OPPOSITION TO THE MOTIONS
TO AFFIRM**

The basic thrust of both motions to affirm is that appellees were prejudiced by the failure of the Commission to hold oral hearings and that therefore no conflict exists between the decision below requiring an oral hearing and the decision in *Long Island Railroad Co. v. United States*, 318 F. Supp. 490 (E.D. N.Y.). We pointed out in our Jurisdictional State-

ment (pp. 12, 15) that the district court failed to scrutinize appellees' mere assertions of prejudice to determine whether either appellee had shown a need for cross-examination or the presentation of live testimony—a defect which in itself creates a conflict with the *Long Island* decision. We now submit that the particular contentions made in the motions to affirm—some of which were not raised before the Commission and thus cannot be relied upon here¹—are without merit.

FEC contends (FEC Motion 8-13) that the Commission has initiated incentive per diem based upon a one-day standard for delivering freight cars once a shipper orders such cars and that FEC is prepared to show that such a standard is unworkable. But the Commission specifically did not base its decision on a one-day standard as claimed by FEC, and fully considered the “service factors” that FEC claims were ignored (J.S. 89a). Similarly, FEC’s alleged need to cross-examine Commission service agents² to test the impact of the over-ordering of freight cars by shippers is sufficiently answered by the Commission’s finding that in 1968 cars were actually placed against 98.7 percent of orders received (J.S. 66a). Since practically all orders were eventually filled, there was

¹ See *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 36-38; *Unemployment Commission v. Aragon*, 329 U.S. 143, 155.

² Such a request was never directed to the Commission and has the potential for protracted delay (see J.S. 46a-48a); there are more than 40 service agents who would be subject to cross-examination on this narrow point alone..

no significant overordering problem and no need for the type of cross-examination proposed by FEC. Finally, FEC contends (FEC Motion 13-14) that the Commission's refusal to exempt terminating lines from the incentive per diem charges will have a disastrous financial impact upon it which is unwarranted because of FEC's "unmatched" efficiency in moving freight cars. The Commission, however, evaluated the submissions and special claims of terminating lines and concluded that no showing of an undue burden had been made (J.S. 101a-102a).

Seaboard continues to challenge the decision to single out standard boxcars for special treatment (Seaboard Motion 26-31). Relying heavily upon the Commission's 1967 decision (332 I.C.C. 11), it complains that the agency did not adequately consider the need for other types of equipment, such as specially equipped boxcars. By relying on the 1967 decision, however, Seaboard ignores the intervening 1968 freight car study, which demonstrated that plain boxcars present a problem of distinguishable magnitude (J.S. 66a), and it ignores the Commission's findings that competition, economics and higher basic per diem will provide fair compensation and incentives for the continued purchase of specialized equipment (J.S. 91a-92a).^a

^a Moreover, Seaboard's attacks on the Commission's findings and rationale (Seaboard Motion 31-38) largely ignore the fundamental difference between the Commission's 1967 proceeding and its current effort to deal with car shortages. The 1967 proceeding considered only a short-term proposal (332 I.C.C. 11, 12, 16); the instant plan is a long-term effort

In the context of the open-ended proceeding at issue here—in the face of a congressional directive to deal with a critical nationwide car shortage problem—it is worth reemphasizing that “the decision here rests for a leap of judgment by the Commission which untailored figures would inform but could not determine.” *Long Island Railroad Co. v. United States*, *supra*, 499 F. Supp. at 499. Experience—rather than the holding of extensive oral hearings—will provide the only basis for revision of the Commission’s incentive per diem order.

For the reasons stated herein and in our Jurisdictional Statement, the motions to affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1971.

to improve car utilization or, alternatively, to expand the supply of the type of car most urgently needed. The Commission has indicated its intention to revise this plan as experience dictates (J.S. 103a), taking into account problems relating to other types of equipment (J.S. 66a, 91a).

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In the Supreme Court of the United States

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No. 70-279

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
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v.

**FLORIDA EAST COAST RAILWAY COMPANY AND SEABOARD
COAST LINE RAILROAD COMPANY**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA**

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION**

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-50a) is reported at 322 F. Supp. 725. The "interim report" of the entire Interstate Commerce Commission (J.S. App. 51a-84a) is reported at 337 I.C.C. 183. The final report of the entire Commission (J.S. App. 85a-114a) is reported at 337 I.C.C. 217.

JURISDICTION

The judgment of the district court was entered on February 18, 1971 (J.S. App. 16a). An order modifying the judgment with respect to certain record keep-

ing matters pending appeal was entered on April 14, 1971 (J.S. App. 49a). The United States and the Commission filed notices of appeal on April 15, 1971 (J.S. App. 115a, 117a). The appeal was docketed on June 14, 1971. Probable jurisdiction was noted by the Court on June 12, 1972 (App. 206). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the rulemaking proceedings here under review are governed by the provisions of Sections 556 and 557 of the Administrative Procedure Act, 5 U.S.C. 556 and 557.

2. If so, whether the appellee railroads were prejudiced by the Interstate Commerce Commission's requirement that all evidence be submitted in written form without the presentation of live testimony or the cross-examination of witnesses and were thus entitled to an oral hearing under Section 556 of the Administrative Procedure Act.

3. Whether the appellee railroads should be ordered to make restitution of the incentive per diem charges they would have paid other railroads but for the order of the court below setting aside the Commission's rules insofar as they apply to the appellee railroads.

STATUTE INVOLVED

Section 1(14)(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 1(14)(a), provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by com-

mon carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 553(c) of the Administrative Procedure Act, 5 U.S.C. 533(c), provides:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in cases governed by its provisions for the submission of oral evidence and the cross-examination of witnesses; it then provides:

In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 16a) setting aside with respect to appellees—the Florida East Coast Railway Company (“FEC”) and the Seaboard Coast Line Railroad Company (“Seaboard”)—an order issued by the Interstate Commerce Commission

as part of its broad effort to combat the freight car shortage problems facing the nation's shippers. In 1966, Congress amended Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a), to authorize the Commission to consider whether an incentive element should be added to the compensation to be paid by one railroad to another for the use of its freight cars, in order to increase the supply and improve the distribution and utilization of those types of freight cars found to be in short supply. The Commission order here in issue (J.S. App. 114a) prescribed incentive per diem charges to be added during part of each year to the ordinary rentals for standard boxcars. In keeping with the purposes of the 1966 amendment, the prescribed incentive elements were fixed at sufficiently high levels to encourage the owners of equipment to purchase more equipment and the users to return the cars to the owners at a faster pace, thereby increasing both the supply and the utilization of freight cars.

A. PROCEEDINGS BEFORE THE COMMISSION

1. *The discontinued investigation of 1966.*—Following the 1966 amendment, the Commission issued a notice of proposed rulemaking in a proceeding entitled *Incentive Per Diem Charges*, Ex Parte No. 252 (31 Fed. Reg. 9240). After extensive and lengthy proceedings, in which 189 separate railroads participated, including participation by some of them in oral hearings, the Commission concluded that “[a]n overall nationwide review of traffic and service demands and trends must precede any valid determination of the

existing or prospective national requirements for freight cars of particular types" (332 I.C.C. 11, 15). It found that "the investigation produced no reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards" and further concluded "that the information necessary to this decision is not presently available" (332 I.C.C. at 16).¹Discontinuing the rulemaking proceedings, the Commission announced its intention to remedy the existing informational deficiency through institution of a nationwide freight car investigation (*id.* at 18).

2. *Freight Car Study of 1968*.—In December 1967, the Commission initiated the present proceeding by requiring all common carriers subject to the Interstate Commerce Act to participate in a study of car demand and supply conditions throughout the country (App. 52-63). The railroads supplied a scientific and systematic sampling of car orders, supply and placement, during the study period, in a total of 32,420 reports that covered 2,641 stations on 135 railroads (J.S. App. 62a). The Commission found, without serious challenge, that the study was statistically sound (J.S. App. p. 89a). The accumulated data were recorded on magnetic tapes and made available to the carriers (J.S. App. 136a).

On May 13, 1969, an initial analysis of the data was presented to the Subcommittee on Surface Transportation of the Senate Committee on Commerce.¹ Mem-

¹ Reprinted in *Freight Car Supply*, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess.

bers of the subcommittee—impatient with delays in implementing the legislative mandate to deal with the pressing problem of car shortages—emphatically expressed the opinion that the Commission had sufficient information upon which to act. See generally Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. A subsequent Commission proposal for further study of additional types of freight cars (App. 64-94) was firmly opposed, as unnecessary, by a number of carriers, including both appellees (App. 23-24, 95-100).

3. *Interim decision.*—Thereafter, on December 12, 1969, the entire Commission issued an interim report, order, and rule, proposing a scale of incentive charges based on a further analysis of the 1968 data (J.S. App. 51a-84a).² Based on these data, the Commission found the existing supply of standard boxcars inadequate to satisfy car demands for at least half of each year—from September through February—and proposed an incentive per diem charge, limited to unequipped boxcars in general service, that would provide, on a yearly basis, a return on investment comparable to that which could be expected by investments in nonregulated corporations (J.S. App. 53a-58a). It was anticipated that the proposed incentive would have the dual benefit of improving car utilization of the type in short supply during the period of greatest need, and providing a fund with which to augment the deficient national boxcar fleet (J. S. App. 54a).

² The order and rule were published at 34 Fed. Reg. 20438.

The interim report stated that the proposed charges were tentative, experimental and open to comment and criticism (J.S. App. 55a). All interested parties were invited to submit verified statements of fact and briefs respecting the tentative conclusions of the report. The Commission did not schedule oral hearings, but directed that those desiring an oral hearing "set forth with specificity the need therefor and the evidence to be adduced" (J.S. App. 81a).

Numerous railroads, shippers, governmental agencies, and organizations of shippers responded to the interim order and favored, opposed, or sought some modification of the decision. Among those seeking an oral hearing were the Long Island Railroad Company and appellees Seaboard and FEC. The Long Island requested "testimony by the Commission's staff which would serve to introduce into evidence the studies relied upon in the Interim Report," and that it be given an opportunity "to cross-examine witnesses in relation thereto and to rebut same" (App. 203, and see App. 103).

Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased. It complained that there had been no "hearing" and urged that the interim order be "set aside until a proper record can be made" (J.S. App. 20a, 27a). It neither proffered data for the use of the Commission nor described any evidence that it wished to adduce at an oral hearing.

FEC filed a brief, and written evidence in the form of verified statements made by two of its officers. In a 2½-page request for an oral hearing (J.S. App. 46a-48a), it stated that it desired to cross-examine

"those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in Ex parte No. 252." It stated that it expected to establish through such cross-examination that (J.S. App. 47a-48a):

(a) Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region;

(b) Railroad ownership of additional plain [standard] box cars would not necessarily change the results summarized in the appendices to the interim report;

(c) No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional boxcars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year;

(d) It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain boxcar in all instances.

4. *Final Commission decision.*—On April 28, 1970, the Commission entered its final report, order and rules (J.S. App. 85a-114a). With modifications not here relevant, it adopted the conclusions of the interim report and set forth additional detailed findings in response to the submissions of the parties. The Commission found that no party had been prejudiced by the submission of evidence in written form and that

therefore, under Section 556 of the Administrative Procedure Act, the hearing requirement of Section 1(14)(a) of the Interstate Commerce Act had been complied with (J.S. App. 87a). It reiterated that this was an "open-ended" proceeding in which the parties were expected to bring to its attention "any evidence of circumstances requiring modification of the rules * * * as experience is gained under the new regulations" (J.S. App. 87a-88a). The requests for oral hearing were denied "in the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern" (J.S. App. 88a). The Commission stated, however, that the requests could be renewed "as experience is obtained with the incentive charges" (*ibid.*).

The Commission denied exemptions to any groups of railroads, but emphasized again that, "following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceeding" (J.S. App. 103a).

B. THE DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

The Long Island Railroad Company attacked the Commission's denial of an oral hearing in an action filed in the United States District Court for the Eastern District of New York. *Long Island R. Co. v. United States*, 318 F. Supp. 490 (J.S. App. 119a-138a). The three-judge district court, in an opinion

by Circuit Judge Friendly, sustained the Commission's decision. The court first held that Section 556 of the Administrative Procedure Act, relating to the conduct of hearings, governed the Commission's proceedings in this case. In reaching this result, the court noted that under Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, Section 556 applies in cases where rules "are required by the statute to be made on the record after opportunity for agency hearing," and concluded that Section 1(14)(a) meant both a hearing and a decision "on the record" (J.S. App. 127a-133a).

Applying Section 556(d) of the Administrative Procedure Act, however, the court held that the Commission could properly rely upon evidence submitted in written form without an oral hearing, unless a party would thereby be "prejudiced" (J.S. App. 134a-137a). Long Island's request for an oral hearing failed to notify the Commission of possible prejudice because it did not specify the need for cross-examination or presentation of live rebuttal testimony (J.S. App. 136a-137a).

Considering specific representations of prejudice made to it but not to the Commission, the court concluded that it was not shown "how cross-examination with respect to the statistics or the presentation of oral rather than written testimony would have aided *materially* in their resolution" (J.S. App. 143a, emphasis supplied). The court emphasized that "the decision here called for a leap of judgment by the Commission which detailed figures would inform but

could not determine" (*ibid.*), and that Long Island had not been denied a fair opportunity to present its case (J.S. App. 138a).

C. THE DECISION BELOW

Seaboard and FEC attacked the Commission's decision in separate suits filed in the United States District Court for the Middle District of Florida. The three-judge court which heard the two suits together entered an initial temporary restraining order enjoining the enforcement of the Commission's incentive per diem order against the two railroads (App. 48-49). On the government's motion, the court modified the temporary restraining order to require the railroads to keep records so that, in the event the Commission were upheld, they would be in a position to make restitution of the incentive payments they would have made to other railroads but for the temporary restraining order (App. 50-51).

After full consideration of the cases, the court set aside the Commission's per diem order with respect to Seaboard and FEC and remanded the cases to the Commission solely on the ground that the two railroads had not been given an oral hearing as required by Section 1(14)(a) of the Interstate Commerce Act and Section 556(d) of the Administrative Procedure Act (J.S. App. 1a-16a). In ruling that it was not enough that the two railroads had been given an opportunity to present their own analyses of the 1968 data or any other pertinent evidence they desired in written form, the court distinguished the *Long Island* case on factual grounds (J.S. App. 7a-8a); the court

concluded, without substantial analysis, that "assertions" made by Seaboard and FEC to the Commission "demonstrate the prejudice" of denying them an oral hearing (J.S. App. 8a).

The district court found the Commission's argument that the evidence to be adduced must be capable of materially affecting its decision "wide of the mark" (*ibid.*); it held that the Commission must give "strict adherence to cherished procedural rights" in the form of oral hearings (*ibid.*) The court found its conclusion "fortified" by statements of the Commission's former General Counsel before the Senate subcommittee that "hearings" were necessary in order to impose incentive per diem charges (J.S. App. 16a).

SUMMARY OF ARGUMENT

The court below erred on two grounds in holding that the Commission was required to afford FEC and Seaboard an opportunity to present live testimony and cross-examine witnesses prior to promulgating incentive per diem rules governing general service box-cars. First, the court erred in applying Section 556 of the Administrative Procedure Act to the rulemaking proceeding here under review. Second,*even if Section 556 was applicable, the court erred in finding that the appellees were "prejudiced" within the meaning of that Section by the absence of oral hearings.

Section 553 of the Administrative Procedure Act specifies the minimum procedures federal agencies must follow in rulemaking proceedings. It requires agencies to give persons an opportunity to submit data and written argument in connection with a rulemaking

proceeding, but does not require the holding of oral hearings. Under Section 553(c), however, Section 556 of the Act is made applicable "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." Section 556(d) generally requires full adjudicatory-type hearings, except that agencies may require all evidence to be submitted in written form where a party will not be prejudiced thereby.

While Section 1(14)(a) of the Interstate Commerce Act requires a "hearing" prior to the adoption of rules relating to freight car service, it does not explicitly require that rules be based "on the record." While in appropriate instances a requirement that rules be based "on the record" may be implied by the statutory language and context or the type of rulemaking involved, there is no such implication here. Far from suggesting a need for full adjudicatory hearings, the promulgation of car service rules applicable to all railroads can best be accomplished through the types of procedures adopted by the Commission in this case. In a decision which is controlling here, this Court recently held that Section 1(14)(a) does not require that rules be based "on the record" and that Section 556 of the Administrative Procedure Act is inapplicable to proceedings under the Section. *United States v. Allegheny-Ludlum Steel Corp.*, No. 71-227, decided June 7, 1972, slip op. at 14-16. Thus, the rule-making proceeding here under review was governed by Section 553(c) and no oral hearing was required.

Even if Section 556 were applicable here, however, the decision below should still be reversed since neither

FEC nor Seaboard established before the Commission that they would be "prejudiced" by the absence of oral hearings. As the three-judge court in the *Long Island* case, *supra*, properly held, to establish "prejudice" entitling it to a hearing under Section 556(d), a party must specify its need to present live testimony and cross-examine witnesses and show how such live testimony or cross-examination would "materially" aid the Commission in resolving the issues before it (J.S. App. 136a-137a).

The court below merely accepted without substantial analysis FEC's and Seaboard's assertions of prejudice as showing a need for a hearing. Seaboard, however, raised no matters which could not be asserted through written submissions to the Commission. FEC, while claiming a need to cross-examine Commission employees who had participated in various freight car studies, a procedure in itself improper, did not show that the matters it sought to establish through such cross-examination would have "materially" aided the Commission in reaching a decision on the proposed incentive per diem rules. Adoption of the rules in this proceeding depended principally on the Commission's exercise of judgment, and not on the resolution of any substantial factual dispute. By requiring the Commission to hold an oral hearing in this case, the court below significantly weakened the "prejudice" requirement of Section 556(d), removing much of the procedural flexibility Congress found appropriate for rulemaking proceedings.

Finally, if this Court upholds the Commission's rules, FEC and Seaboard should be ordered under

the principles of *Arkadelphia Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145, 146, to make restitution of the incentive per diem charges they would have incurred but for the temporary restraining order and injunction entered by the court below barring enforcement of the Commission's rules against them.

ARGUMENT

I

THE COMMISSION WAS NOT REQUIRED TO PERMIT ORAL PRESENTATIONS OF EVIDENCE OR CROSS-EXAMINATION IN THIS RULEMAKING PROCEEDING SINCE SECTION 556 OF THE ADMINISTRATIVE PROCEDURE ACT IS INAPPLICABLE

In rulemaking proceedings, the Commission and other federal regulatory agencies are required by Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, to give interested persons notice (Section 553(b)) and an opportunity to participate in the rulemaking "through the submission of written data, views, or arguments with or without opportunity for oral presentation" (Section 553(c)). As a general matter, Congress did not impose on the rulemaking process the formal requirements of oral hearings and cross-examination that characterize adjudicatory proceedings.

Congress recognized, however, that some regulatory statutes specifically require a judicial-type hearing, even when the agency is engaged in rulemaking. It therefore preserved the requirements of those statutes by adding at the end of Section 553(c):

* * * When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556 prescribes the procedures for the hearings to which the Section applies and Section 557 prescribes the procedures for rendering decisions subsequent to such hearings.³

The legislative history of Section 553, summarized in the ~~Attorney General's Manual on the Administrative Procedure Act~~,⁴ pp. 34-35, discloses that Congress deliberately refrained from making Sections 556 and 557 applicable to rulemaking proceedings in every case where a regulatory statute requires a "hearing," but instead made those provisions applicable only where both a hearing and a decision "on the record" are required by the relevant statute. As the Attorney General's Manual points out (pp. 32-33), few federal statutes that require a hearing in rulemaking state

³ Of relevance here is the provision in Section 556(d) entitling a party to present "oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full or true disclosure of the facts." These rights, however, are qualified by the last sentence of Section 556(d), which provides that: "In rule making * * * an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in/written form." In point II, *infra*, we show that even if Section 556 applies to the rulemaking proceeding here under review, neither FEC nor Seaboard was prejudiced by the absence of oral hearings.

⁴ The Attorney General's Manual, which contains a section-by-section analysis of the Administrative Procedure Act, was compiled after the Act became law to guide federal agencies in adjusting their procedures to the requirements of the Act. See Manual, p. 6.

explicitly that the agency decision following the hearing must be "on the record."⁵ In the absence of an explicit statement, however, a requirement that a decision be based "on the record" might be inferred from other provisions of the statute or from the type of rulemaking involved (*ibid.*). Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), prescribing the Commission's ratemaking authority, for example, does not explicitly require Commission rate decisions to be "on the record." The context of the Section, however, which authorizes the Commission "to enter upon a hearing concerning the lawfulness" of rates, and its requirement that a "full hearing" be completed before the Commission makes its final order, strongly suggest that the Commission's ultimate decision must be "on the record." Indeed, this Court has held that a requirement of a "full hearing" in a ratemaking statute (Section 310 of the Packers and Stockyards Act of 1921, 7 U.S.C. 211) refers to a quasi-judicial proceeding in which the decision is based on the evidence introduced at the hearing. *Morgan v. United States*, 298 U.S. 468, 480.

There are other statutes, however, in which neither the statutory language and context nor the type of rulemaking involved suggests that a "hearing" requirement also includes a requirement that a decision be based "on the record." Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a)—

⁵ The Manual (pp. 32-33) cites Section 701 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1055, which then required the Administrator in issuing certain rules to "base his order only on substantial evidence of record at the hearing."

the provision under which the rules here in issue were promulgated—is in this category. Section 1(14) (a) simply states that the Commission “may, after hearing, * * *” establish rules fixing compensation for the use of freight cars. No reference is made to a decision “on the record” or even to a “full hearing.” Nor does the subject matter involved—the promulgation of reasonable car service rules—suggest a requirement that an order adopting rules be based “on the record.” As Judge Friendly explained in the *Long Island* case, *supra*, the decision here to add specific per diem incentives to freight car rentals “called for a leap of judgment by the Commission which detailed figures would inform but could not determine” (J.S. App. 137a). It is precisely in such a situation that rulemaking flexibility is desirable. Since a requirement that rules under Section 1(14) (a) be based “on the record” is not implied by the statutory language or context or by the nature of the rulemaking involved, it follows that Sections 556 and 557 of the Administrative Procedure Act are not applicable to the rulemaking proceedings here under review.

Consistently with the foregoing analysis, this Court has squarely held that rules adopted under Section 1(14)(a) of the Interstate Commerce Act are not required to be based “on the record.” *United States v. Allegheny-Ludlum Steep Corp.*, No. 71-227, decided June 7, 1972, slip op. at 14-16. In that case, the Court upheld certain car service rules promulgated after a hearing by the Commission. The Court specifically rejected the contention that the Commission’s order

failed to comply with the provisions of Sections 556 and 557 of the Administrative Procedure Act on the ground that those Sections were inapplicable. The Court noted that, under Section 553(c), Sections 556 and 557 apply only where a regulatory statute, in addition to providing for a hearing, requires that the agency decision be "on the record" (slip op. at 15-16). In a passage which is controlling here, the Court then stated (slip op. at 16):

We do not suggest that only the precise words "on the record" in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings, but we do hold that the language of the Esch Car Service Rules Act [Section 1(14)(a) of the Interstate Commerce Act] is insufficient to invoke these sections.

In his opinion in the *Long Island* case, *supra*, Judge Friendly notes (J.S. App. 133a) that the Commission in the past has conducted full hearings, during which the parties were permitted to present oral testimony and cross-examine witnesses, prior to the promulgation of rules under Section 1(14)(a). The fact that prior to the proceeding here under review the Commission had not taken full advantage of the flexible procedures permitted by Section 553(c) of the Administrative Procedure Act, however, is of limited significance.* The legislative history of Section

* The court below quoted extensively (J.S. App. 9a-15a) the testimony before Congress of a former General Counsel of the Commission to the effect that the Commission must hold a "hearing" prior to the adoption of incentive per diem rules under Section 1(14)(a). The witness, however—who distinguished Section 1(14)(a) from Section 1(15) of the Act under

553(c) discloses that the Section was intended to set minimum standards for rulemaking proceedings. The Senate committee report on the Administrative Procedure Act makes clear that in matters of great import, agencies should adopt more elaborate procedures appropriate to the particular proceedings. S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in Administrative Procedure Act, Legislative History (published by the Senate Judiciary Committee), pp. 200-201. The report states that where sharply contested issues of fact are presented in rulemaking proceedings, agencies should not as a matter of good practice take advantage of the exemption from the requirements of Sections 556 and 557 contained in Section 553(c) (*id.* at 216). That the Commission in the past has conducted judicial-type hearings in rulemaking proceedings under Section 1(14)(a) is consistent with these admonitions.

In the proceedings under review, however, it was a proper exercise of the discretion Congress conferred on it for the Commission to conclude that the public interest would be better served by a more limited procedure, in light of the on-going nature of the proceeding, the severe shortage of freight cars, the fact that all rail carriers in the nation would be affected (and oral hearings

which the Commission may issue certain emergency car service orders without notice or hearing of any kind—did not address himself to the type of hearing required by Section 1(14)(a). His testimony is thus of little relevance here. In any event, opinions expressed by Commission members or staff before congressional committees are not binding on the Commission. See *Minneapolis R.R. Co. v. Peoria Ry.* 270 U.S. 580, 585; *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 146.

might therefore be cumbersome and unduly repetitious), and the extreme displeasure voiced by Congress in 1969 with the Commission's failure speedily to adopt the incentive per diem rules authorized by Congress in its 1966 amendment to Section 1(14)(a).⁷

If Sections 556 and 557 of the Administrative Procedure Act are not applicable to the proceedings here under review, the proceedings are governed by Section 553 alone, and the Commission was under no obligation to allow the presentation of oral testimony and cross-examination. As this Court held in *Allegheny-Ludlum, supra*, proceedings under Section 1(14)(a) of the Interstate Commerce Act are governed by Section 553 of the Administrative Procedure Act, and all that is required by Section 553 is "basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose" (slip op. at 16). The Court specifically noted that Section 1(14)(a) "likewise requires" a hearing (slip op. at 16, n. 5). The inference is clear that the hearing requirement would be fully satisfied by the Commission's compliance—which is undisputed here—with the pro-

⁷ Judge Friendly in the *Long Island* case, *supra*, describes (J.S. App. 125a) in general the reaction of Congress to the delays consumed by the Commission's investigations into the need for incentive per diem charges. See Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess.

cedures specified in Section 553(c) of the Administrative Procedure Act. See, also, *Siegel v. Atomic Energy Commission*, 400 F. 2d 778, 785-786 (C.A. D.C.).

II

EVEN IF SECTION 556 OF THE ADMINISTRATIVE PROCEDURE ACT IS APPLICABLE, THAT SECTION WAS COMPLIED WITH SINCE APPELLEES WERE NOT PREJUDICED BY THE SUBMISSION OF ALL EVIDENCE IN WRITTEN FORM

If the Court agrees with our submission that *Allegheny-Ludlum* is controlling here and that Section 556 of the Administrative Procedure Act is inapplicable, it would follow that the judgment below should be reversed. If Section 556 were deemed applicable, however, it would then be necessary to consider whether the Commission complied with its requirements. This is the question to which we now turn.

As we have noted, Section 556(d) entitles a party in a Commission proceeding to present oral evidence and conduct cross-examination subject to the qualification that in rulemaking and certain other proceedings the Commission may provide for the submission of all evidence in written form "when a party will not be prejudiced thereby." The issue here is whether either FEC or Seaboard established before the Commission that it would be "prejudiced" by the absence of an opportunity to present oral evidence and cross-examine witnesses. As the three-judge court in the *Long Island* case, *supra*, concluded, to establish "prejudice" entitling it to an oral hearing under Section 556(d), a party must identify with specificity the matters with respect to which it needs to present live

testimony or cross-examine witnesses and show how such live presentation (as opposed to submission in written form) or cross-examination would enable the party to present its case with respect to the Commission's rule proposals and would "materially" aid the Commission in resolving the issues before it (J.S. App. 136a-137a). Neither Seaboard nor FEC has met this burden.

In concluding that Seaboard had been "prejudiced" by the Commission's procedures in this case, the court below merely listed the railroad's contentions. The court noted, for example, that Seaboard had pointed out to the Commission that it had recently purchased a large number of specially equipped boxcars and had argued that the limitation of the proposed incentive rates to general boxcars would penalize Seaboard for investing in special equipment. Seaboard had also questioned the foundation of the Commission's rules, had objected to the requirement that incentive payments be placed in a fund earmarked for new equipment purchases and had alleged that the Commission's order would cost Seaboard about \$1.8 million annually (J.S. App. 7a-8a, 19a-27a). While these contentions may indicate that the adoption of the rules was not in Seaboard's best interest, they do not establish that the denial of an oral hearing prevented Seaboard from making the contentions and presenting supporting data. Seaboard did not allege, for example, that its submissions or the submissions of others raised sharply contested issues of fact that required an oral hearing for proper resolution.

FEC, as the court below noted (J.S. App. 8a), presented certain policy reasons why it should be exempted from the incentive per diem charges (J.S. App. 34a-41a).^{*} Its short request for an oral hearing (J.S. App. 46a-48a) asserted that it needed an opportunity to test the factual bases of the reports compiled by the Commission staff from data submitted by the railroads and summarized by the Commission in appendices to its interim report (see J.S. App. 62a-80a). FEC stated that it expected to establish by cross-examination of Commission employees participating in the study (1) that the failures to fill shippers' requests for freight cars reported in the study "may" not have been affected by the supply of cars at particular locations, (2) that increased freight car ownership "would not necessarily" change the results summarized in the appendices to the interim study, (3) that no computation has been made of the number of freight cars needed to eliminate "all" delays in providing cars to shippers and (4) that it is unreasonable to expect railroads to supply cars for loading within 24 hours in "all" instances (J.S. App. 47a-48a).

To begin with, even if an oral hearing were held, FEC would not be entitled to cross-examine Commission staff on the compilation of the reports. The basic data underlying the reports were available to the railroads who could have compiled their own reports. The Commission staff in this instance did not produce testimony in any sense, but was merely assisting the Com-

^{*}FEC also submitted written evidence in the form of verified statements by two of its officers (App. 106-149).

mission in analyzing these data as part of the decisional process. This Court has held that a litigant is not entitled "to probe the mental processes" of the decisionmaker itself. *Morgan v. United States*, 304 U.S. 1, 18; *United States v. Morgan*, 313 U.S. 409, 422. Here, while FEC was not attempting to cross-examine individual Commissioners, it was seeking to cross-examine those who had aided the Commissioners in reaching their decision. Such cross-examination would disrupt the internal working of the agency and the integrity of the administrative process. See *Walled Lake Door Co. v. United States*, 31 F.R.D. 258 (E. D. Mich.).

In any event, cross-examination of the Commission staff on the above matters, even if it might have established one or more of FEC's contentions, would not have materially aided the Commission in resolving the issues before it. FEC merely sought to prove that the Commission had not acted with absolute certainty and had not proposed a rule that by itself would end the freight car shortage. FEC's contentions were phrased in such a way that the Commission could readily have agreed with each "fact" sought to be established by FEC without changing any of its conclusions with respect to the need for incentive per diem charges. In these circumstances, the holding of extensive oral hearings would have been a wasted effort* and would only have delayed further the adoption of the rules long under study. Indeed, the Commission had already held

* Cf. *Denver Stock Yard v. Livestock Assn.*, 356 U.S. 282, 287; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205.

extensive oral hearings in the abortive investigation of 1966 and 1967 (see *Incentive Per Diem Charges*, 332 I.C.C. 11, 12), during which the railroads had in the main merely stated their positions without attempting to create a record upon which the Commission could act. Moreover, in the final stages of decision, the basic issues were matters of policy and judgment rather than of disputed fact. As Judge Friendly aptly stated in the *Long Island* case, the Commission was called upon to perform a "leap of judgment" to determine whether "some form of incentive compensation" would promote the objectives of the 1966 amendment to the Act and "if so, what the form should be" (J.S. App. 137a-138a).

In short, Seaboard and FEC have fallen short of establishing the "prejudice" that, under Section 556(d) of the Administrative Procedure Act, would preclude the Commission from receiving all evidence in written form. In adopting Section 556(d), Congress refrained from establishing an absolute right to cross-examination in rulemaking proceedings. By requiring the Commission to hold an oral hearing on the basis of the assertions made by Seaboard and FEC here—assertions of a type that could be made in virtually all rulemaking proceedings—the court below in practical effect eliminated the "prejudice" requirement of Section 556(d) and opened up new and unwarranted avenues of delay in rulemaking proceedings.

III

THIS COURT SHOULD DIRECT THE COURT BELOW TO ORDER
FEC AND SEABOARD TO MAKE FULL RESTITUTION OF THE
INCENTIVE PER DIEM CHARGES THEY WOULD HAVE
PAID BUT FOR THE ORDERS OF THE COURT BELOW

The incentive per diem rules adopted by the Commission became effective for all railroads throughout the country, other than FEC and Seaboard, on September 1, 1970. FEC and Seaboard were exempted from the rules by a temporary restraining order entered by the court below on August 28, 1970 (App. 48-49). Both FEC and Seaboard use disproportionately large numbers of general service boxcars belonging to other railroads, and they acknowledged before the Commission that they would thus owe substantial sums to connecting railroads under the incentive plan.¹⁰ Consequently, the government requested the district court to amend its temporary restraining order to provide the means for FEC and Seaboard to make restitution to those connecting railroads should the Commission's order be sustained.

On August 31, 1970, the district court entered a further order requiring FEC and Seaboard to keep records in accordance with the newly established accounting rules of the Commission¹¹ so that they

¹⁰ Seaboard stated that it would "lose in excess of \$1.5 million each year" as a result of the incentive per diem rules (J.S. App. 24a), without specifying how much of this was payable to others. FEC stated that it would owe an average of about \$27,000 for each month the higher charges were in effect (J.S. App. 40a).

¹¹ On May 28, 1970, the Commission's Bureau of Accounts established uniform record-keeping requirements for all railroads subject to the incentive per diem rules (App. 205).

would be in a position to pay accrued incentive charges to other railroads and receive incentive payments for the rentals of their own cars "if so ordered by the final decision of this Court" (App. 50-51).¹² Finally, after refusing to enforce the Commission's rules against appellees, the three-judge court modified its final judgment at the government's request to require FEC and Seaboard "to continue to maintain the accounting records described in the August 31, 1970, order of this court" (J.S. App. 49a). The district court thus recognized that if the Commission's rules are ultimately upheld by this Court, FEC and Seaboard may be required to make restitution of the incentive per diem charges they would have incurred but for the temporary restraining order and injunction.

This Court has long recognized that "[i]t is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to [control] that which has been wrongfully done by virtue of its process." *Arkadelphia Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145-146. In *Arkadelphia*, a carrier obtained a judicial order enjoining, pending a final court determination on the merits, lower freight rates set by a state agency. While the restraining order was in effect, the carrier charged shippers rates higher than those set by the rate order. Subsequently, the courts dismissed without prejudice for failure of proof the attack on the rate

¹²The court also made clear that its stay prevented FEC and Seaboard from collecting incentive charges owed to them (App. 50).

order and dissolved the injunction. Shippers who had paid the higher rates while the court's injunction was in effect sought a refund of the excess monies paid during the period. Finding restitution appropriate in the circumstances, this Court observed that when the carriers failed to sustain the validity of their rates, "they at the same time showed that the injunctions ought not to have been allowed." 249 U.S. at 144. The shippers were entitled to a refund under the principle "long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he lost thereby." 249 U.S. at 145. See also *Baltimore & Ohio Railroad Co. v. United States*, 279 U.S. 781, 786; *Middlewest Motor Freight Bureau v. United States*, 433 F. 2d 212, 225-229 (C.A. 8), certiorari denied, 402 U.S. 999.

The *Arkadelphia* principle is directly applicable here. All railroads in the country other than FEC and Seaboard have been incurring incentive per diem charges since September 1, 1970. Appellees alone obtained a stay in the hope that the Commission's rules would not be enforced against them. If, as we urge, this Court upholds the Commission's rules, equity would require that FEC and Seaboard be placed in the position they would have been in but for the stay and injunction.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and restitution should be required of FEC and Seaboard.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

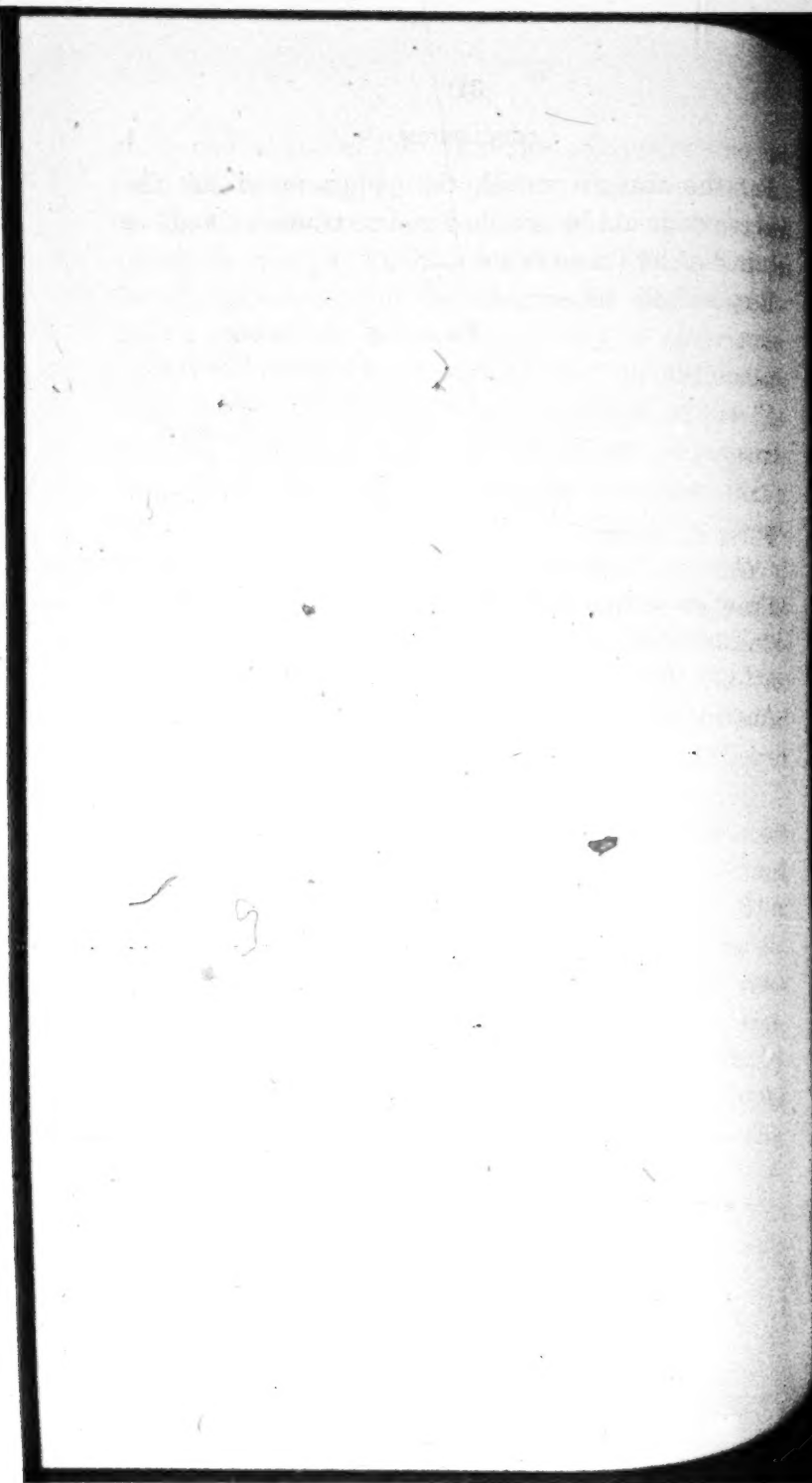
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August 1972.



Supreme Court of the United States

October Term, 1972

No. 70-879

**UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,**

Appellants,

**FLORIDA EAST COAST RAILWAY COMPANY
AND
SEABOARD COAST LINE RAILROAD COMPANY,**

Appellees.

**On Appeal from the United States District Court
for the Middle District of Florida.**

**WRIT OF HABEAS CORPUS
SEABOARD COAST LINE RAILROAD COMPANY**

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August, 1972

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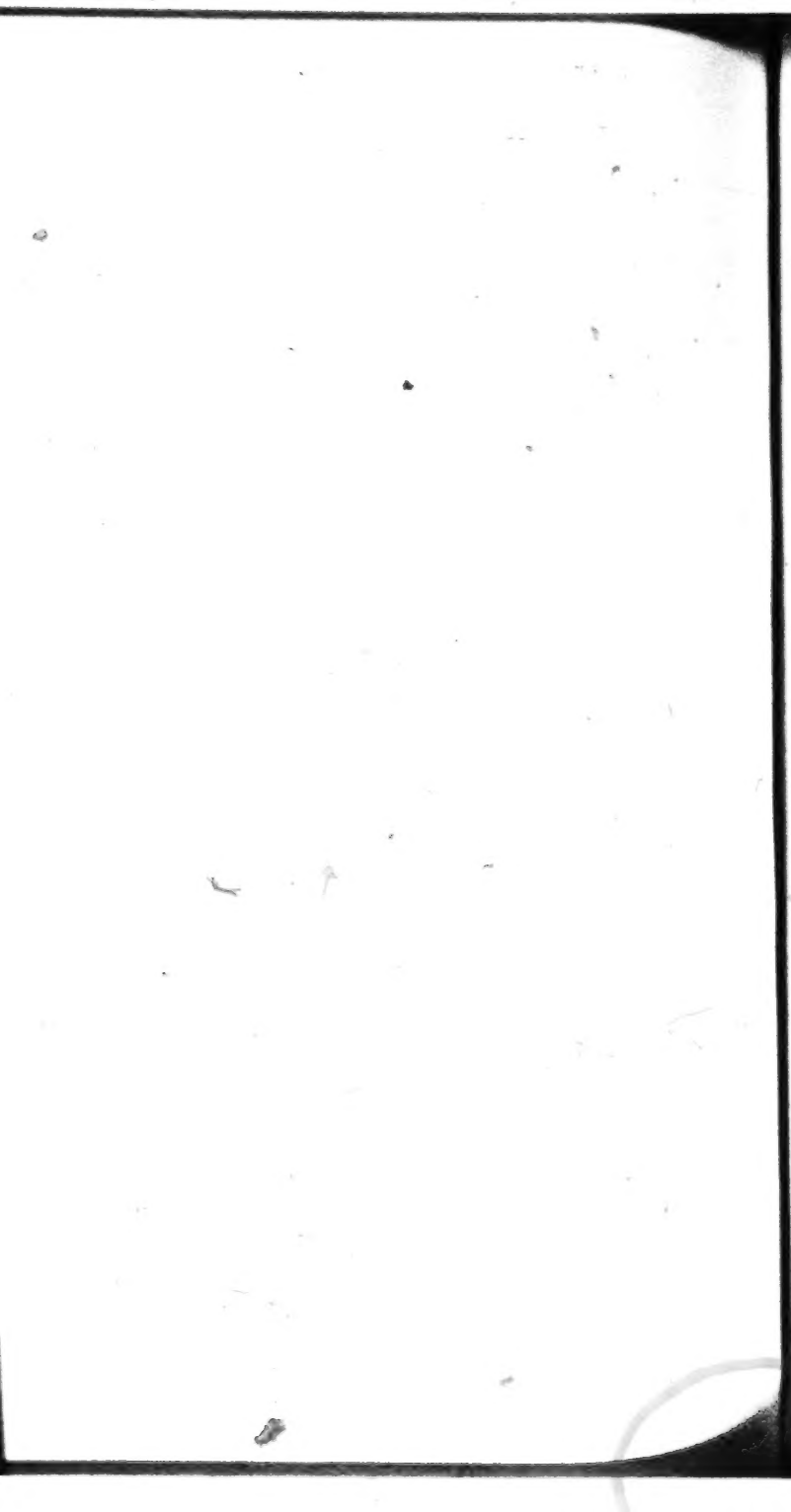
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In The
Supreme Court of the United States
OCTOBER TERM, 1972

No. 70-279

**UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,**
Appellants,

v.

**FLORIDA EAST COAST RAILWAY COMPANY
AND
SEABOARD COAST LINE RAILROAD COMPANY,**
Appellees.

**On Appeal from the United States District Court
for the Middle District of Florida**

**BRIEF OF APPELLEE
SEABOARD COAST LINE RAILROAD COMPANY**

This Brief is filed on behalf of Appellee, Seaboard Coast Line Railroad Company, hereinafter referred to as Seaboard Coast Line.

OPINION BELOW

The opinion of the District Court (J.S. App. 1a-48a)¹ is reported at 322 F.Supp. 725.

¹J. S. App. refers to the appendix to Appellants' Jurisdictional Statement.

JURISDICTION

The judgment of the District Court (J.S. App. 16a), entered on February 18, 1971, set aside and enjoined the order entered by the Interstate Commerce Commission in an administrative proceeding identified as Ex Parte No. 252 (Sub-No. 1), *Incentive Per Diem Charges—1968*, 337 I.C.C. 217 (J.S. App. 85a-114a). Notices of appeal were filed by the Interstate Commerce Commission and the United States on April 15, 1971. (J.S. App. 115a-118a.) Probable jurisdiction was noted by this Court on June 12, 1972. (App. 206).² The jurisdiction of this Court rests on 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether the proceedings here under review are governed by the provisions of Sections 556 and 557 of the Administrative Procedure Act; and
2. Whether the parties to the Interstate Commerce Commission proceeding received the protection afforded by the Administrative Procedure Act and the Interstate Commerce Act.

STATUTES INVOLVED

The pertinent statutes involved are: Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), and Sections 553(c), 556(d) and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 553(c), 556(d) and 706. (Appendix A hereto)

STATEMENT

Each railroad pays a rental charge, called per diem, for its use of any kind of rail car owned by another railroad.

² App. refers to the Joint Appendix to Briefs filed with this Court.

The purpose of per diem is to compensate the owning railroad for its car ownership costs.

The proceeding now before this Court relates to *incentive* per diem, which is an additional charge over and above regular per diem. Its stated purpose is to give railroads an incentive to promptly move cars and to acquire new ones. As prescribed by the Commission in the disputed decision, incentive per diem would apply to only one kind of railroad boxcars, plain boxcars.

A. Proceedings Before the Commission

The Commission's authority to impose incentive per diem is found in Section 1(14)(a) of the Interstate Commerce Act.³ The "incentive" provisions of that section were enacted by Congress in 1966 (Public Law 89-430) and, later that year, the Commission began an investigation into the possibility of prescribing incentive per diem charges. The following year, on October 3, 1967, being without facts sufficient to warrant the imposition of incentive charges, it discontinued the proceeding. That was done in *Incentive Per Diem Charges*, 332 I.C.C. 11 (1967), a decision which will sometimes be referred to as "the 1967 decision."

Later in the year, on December 15, 1967, the Commission published a notice requiring all railroads to participate in a study of rail car supply and demand by submitting data in response to a questionnaire. Then, on December 12, 1969, without having held hearings, and with only raw statistical data of a limited nature in hand, the Commission handed down a decision, described as an "interim report," in *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 (J.S. App. 51a-84a). That decision "announced a provisional judgment with respect to the form and amount" of incentive per diem

³ Reproduced at pages 3-4 of the Appellants' brief.

charges to be added to the regular per diem charges, but the payments were to be applicable only to "plain," or "unequipped," boxcars. The parties were permitted to comment upon the Commission's "interim report" by means of statements or briefs and, on April 28, 1970, the Commission handed down a final order which adopted all of the material "provisional" conclusions reached in its "interim report."⁴

The decision of April 28, 1970, is found in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217 (J.S. App. 85a-114a), and, while it is that decision and order which is the subject of this proceeding, it is founded upon, and is virtually the same as, the "interim report."

The final decision prescribed an experimental plan by which the Commission thought that it might improve the utilization, and the size, of the railroads' plain boxcar fleet through so-called incentive payments.

B. The Action in the Court Below

In June 1970, both the Seaboard Coast Line and the Florida East Coast Railway Company (FEC) filed complaints seeking to enjoin, annul and set aside the order of the Interstate Commerce Commission, dated April 28, 1970, in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217.

Upon motion of the FEC and of the Seaboard Coast Line, which had shown that it would lose some 1.8 million dollars annually because of the Commission's experiment, a temporary restraining order was granted. Subsequently, the District Court set aside the order insofar as it affects the Seaboard Coast Line and the FEC because of the Commission's failure to hold necessary hearings.

⁴ Appellants' brief, p. 9.

In the meanwhile, a United States District Court in New York had handed down a decision related to the Commission's April 28, 1970, order in *Long Island Railroad Company v. United States*, 318 F.Supp. 490 (D.C.N.Y. 1970) (J.S. App. 119a-138a). By stipulation in that case, however, there was only one issue presented, and it had been made quite narrow; that is, the only question before the New York court was whether, in the absence of the Long Island's failure to point to "specifics" related to the need for a hearing, and since the Long Island did not put the Commission on notice that prejudice would result absent a hearing, an oral hearing was required.⁵ The court found that Section 556 of the Administrative Procedure Act governed, but that the Long Island had failed to show why it needed the hearing.

C. The Positions of the Parties Here

The Commission's Jurisdictional Statement urged that the questions before this Court are substantial for two reasons;⁶ the first being that the District Court's decision, if allowed to stand, will disrupt the "incentive" experiment before it has been given a fair trial;⁷ and the second being that the action of the court below conflicts with the related lower court decision in *Long Island*. It went on to urge that the District Court was wrong because the Appellees are said not to have been prejudiced by the ICC's handling of the proceeding; and because the lower court "failed to assess the likely impact that the matters allegedly requiring an oral hearing would have had upon the Commission's conclu-

⁵ *Long Island Railroad Company v. United States*, 318 F. Supp. 490, 499-500 (D.C. N.Y. 1970) (J.S. App. 136a-138a).

⁶ Jurisdictional Statement, pp. 13-15.

⁷ That reason now seems to have been abandoned, presumably because the rules have been in effect for 2 years.

sions." Further, said the Commission, "it is extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order."⁸

Although the Commission's Jurisdictional Statement was based upon the assumption that Sections 556 and 557 of the Administrative Procedure Act governed its action throughout this proceeding, it now says that, since the "incentive" language in Section 1(14)(a) of the Interstate Commerce Act does not explicitly or impliedly require a hearing "on the record," the provisions of 5 U.S.C. §§ 556 and 557 do not govern here."

Appellee Seaboard Coast Line says, on the other hand, that the Commission's proceeding under review is governed by the provisions of Sections 556 and 557 of the Administrative Procedure Act, and that the Commission was wrong in using, as the lower court phrased it, a "procedural shortcut." A proper hearing should have been held, and whether or not the Seaboard Coast Line was *likely* to have "affected the Commission's ultimate order" is not the point. Rather, it was entitled to the protection of its procedural rights, and their denial here, in favor of the Commission's desire to still criticism from Congressmen who were "impatient with delays,"¹⁰ prejudiced both the Seaboard Coast Line and the shipping public which it serves. The court below was correct in finding that the Commission acted illegally.

Further, though the District Court did not reach these issues,¹¹ the Commission did not properly apply the provisions of Section 1(14)(a) of the Interstate Commerce Act, did not give sufficient reasons for its conclusions as

⁸ Jurisdictional Statement, p. 15.

⁹ Appellants' brief, pp. 14, 19.

¹⁰ Jurisdictional Statement, p. 6.

¹¹ *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 728 (D.C. Fla. 1971) (J.S. App. 5a).

required by Section 557 of the Administrative Procedure Act, and, contrary to the mandate of Section 706 of the Administrative Procedure Act, acted arbitrarily and had no substantial evidence of record to support conclusions in the disputed decision which were at complete variance with its conclusions in the 1967 decision.

SUMMARY OF ARGUMENT

In its 1967 decision, the Interstate Commerce Commission concluded that the evidence of record showed that:

"(1) present operating practices would not be improved (2) nor would more effective use be made of freight cars (3) nor would the building of more freight cars be generated as a result of applying an interim incentive charge."¹²

Without any evidence to warrant a change in that conclusion, the Commission changed its mind and prescribed the "experimental"¹³ per diem now under attack.

There is no quarrel here with the proposition that the Interstate Commerce Act invests the Commission with extensive authority with respect to car service rules and practices. In emergencies involving car shortages, the Commission may call upon Section 1(15) of the Act, and is expressly authorized there to proceed summarily, "without *** hearing" if necessary.¹⁴ Here, however, the Commission proceeded under Section 1(14)(a), and the first sen-

¹² *Incentive Per Diem Charges*, 332 I.C.C. 11, 16 (1967).

¹³ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 187 (1969) (J.S. App. 55a).

¹⁴ "Summarily," that is, said the Commission's General Counsel, "on every element except the element of compensation to be paid for the use of the cars." *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 730 (D.C. Fla. 1971) (J.S. App. 11a).

tence of that section permits car-service action only "after hearing."

The additional burden placed on the Commission in 1966 by Public Law 89-430, which is the language found in the second and third sentences of Section 1(14)(a), distinguishes this "compensation" proceeding from that considered in the recent *Allegheny-Ludlum Steel* decision¹⁵ involving operational rules of general application. The intent of Congress is clear. Where "compensation" is involved, the second and third sentences permit decision only after the Commission has weighed many factors; and, still more, in fixing an "incentive element"—that is, where, as here, there is the shifting of millions of dollars between carriers—additional "considerations" are required by Section 1(14)(a) to be evaluated. Only then may the Commission make its decision, and, to use the language in the second sentence of Section 1(14)(a), the decision must be "on the basis of such consideration."

In going about its regulatory business, including its consideration of car problems, the Commission is entitled to call upon its experience. But, this Court has warned on several occasions that the Commission will not be permitted to flaunt its "administrative expertise" in such a way as to become "a monster which rules with no practical limits on its discretion."¹⁶ "That," said the Court, "is impermissible under the Administrative Procedure Act."¹⁷ "Lax procedure" cannot be sanctioned, and, where the Commission's

¹⁵ *United States v. Allegheny-Ludlum Steel*, U.S. 32 L Ed 2d 453 (1972).

¹⁶ *Baltimore & O. R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87, 92 (1968); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962).

¹⁷ *Baltimore & O. R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87, 92 (1968).

handling of a proceeding is deficient, the Court will not "bridge the gap by blind reliance on expertise."¹⁸

This requirement as to procedural safeguards does not now come as news to the Commission. In its initial order in this very proceeding, the Commission carefully noted that it would proceed under authority of "particularly * * * the Administrative Procedure Act (5 U.S.C. 553, 556 and 557)." Earlier, in its 1967 decision the Commission said:

"Section 1(14)(a) differs from Section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. § 551, et seq."

And still earlier, Congress had been promised, so far as the second and third sentences of Section 1(14)(a) are concerned, that:

"* * * if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates."¹⁹

In *Long Island* it even stipulated that the protection of those three sections was a jurisdictional prerequisite.²⁰ As late as its Jurisdictional Statement here, the Commission continued to press forward in the belief that the proceeding was governed by the Administrative Procedure Act, including Sections 553, 556 and 557. It seems to us, then, that since the I.C.C. was responsible for the passage of Public Law 89-430, some weight should be attached to its interpretation of the language.

Nor should the applicability of the full protection of the Administrative Procedure Act surprise the office of the

¹⁸ Id., pp. 92, 95.

¹⁹ *Incentive Per Diem Charges*, 332 I.C.C. 11, 14 (1967).

²⁰ *Long Island Railroad Company v. United States*, 318 F.Supp. 490, 491, n.2 (D.C.N.Y. 1970) (J.S. App. 119a-120a).

Solicitor General. For it supported the Commission's reliance upon Sections 553, 556 and 557 in the court below, as well as before the New York court in *Long Island* which agreed with them.²¹ And, the Attorney General's Manual on the Administrative Procedure Act (1947),²² page 34, tells us that:

"It appears, therefore, that rules (as defined in section 2(c)) which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies Act on the basis of the evidence adduced at the agency hearing, must be regarded as 'required by statute to be made on the record after opportunity for an agency hearing.'"

The second and third sentences of Section 1(14)(a) plainly show the need for a record.

Many sections of the Interstate Commerce Act specifically permit the processing of matters without hearing. But, Section 1(14)(a) is not one of them; it requires a hearing, and this Appellee did not receive one, either on the record or off. Not only does it not know what evidence was considered, but it knows that conclusions were reached without supporting evidence, and that it was not given an opportunity to test the grounds for the ICC's decision. Whether or not this Court desires to hold the Commission to its promise that "extreme caution" would be exercised in "incentive" proceedings, the Court, nevertheless, ought to remind the Commission that it considers "there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."²³

²¹ *Long Island Railroad Company v. United States*, 318 F.Supp. 490, 497 (D.C. N.Y. 1970) (J.S. App. 131a).

²² To which appellants refer at pages 17-18 of their brief.

²³ *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U.S. 88, 93 (1913).

Had the procedural protection of the Administrative Procedure Act been afforded, the Seaboard Coast Line would have had its opportunity to show, not only the harm which it would experience, but the reasons why the rules under attack will not do the intended job, are not reasonable, and, instead, are arbitrary, not rationally supported by evidence, and, in fact, contrary to such evidence as is presently found on the record.

ARGUMENT

Appellee believes that, basically, the Court will simply want to know whether, in this proceeding, "the announced grounds for the agency decision comport with the applicable legal principles."²⁴ We urge that they do not.

Throughout this proceeding, the Seaboard Coast Line has taken the position that the Commission ignored the requirements of the Administrative Procedure Act, failed to give it a proper hearing, and that such failure was damaging to it. That position has ample support in law and in fact, and the Commission's brief fails to shake it. Therefore, we argue that the court below was correct in its conclusion.

A. The Wording of Section 1(14)(a) Confirms that these Proceedings Are Governed by the Provisions of Sections 556 and 557 of the Administrative Procedure Act.

Section 1(14)(a) of the Interstate Commerce Act is comprised of three sentences, the first of which is part of the Esch Car Service Act. That sentence invests the Commission with the authority to take specified action with respect to car service matters, but only "after hearing." So, some kind of "hearing" is necessary. And, it "must be a hearing

²⁴ *City of Portland v. United States*, U.S. , 40 L.W. 5091, 5101, June 27, 1972.

in a substantial sense.”²⁵ This Court has said that, at least, where a hearing is required it will not let the Commission “capriciously make findings by administrative fiat”; that “the Commissioners cannot act upon their own information”; that the parties must be permitted to “test the sufficiency of the facts”; and, again, that “there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.”²⁶ The Commission did not even clear that minimum requirement.

But, had it done so, it still would have foundered on Public Law 89-430, the next two sentences of Section 1(14)(a) which comprise the incentive per diem legislation of 1966. Those sentences were designed by Congress especially for the type of proceeding which is the subject of this action, and they contain the crucial language here. They say that, where “compensation,” including an “incentive element or elements of compensation,” is involved, the Commission

“shall give consideration”

to specified factors,

“and shall, on the basis of such consideration” (Emphasis added)

reach certain determinations as to car service compensation.

As this Court said only recently in *Allegheny-Ludlum Steel*,²⁷ the precise words “on the record” need not be used in order to bring Sections 553(c), 556 and 557 into play.

²⁵ *Morgan v. United States*, 298 U.S. 468, 481 (1935).

²⁶ *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U.S. 88, 91, 93 (1913).

²⁷ *United States v. Allegheny-Ludlum Steel*, U.S. , 32 L Ed 2d 453, 465 (1972).

In fact, those words are not used once in the some 72 sections and subsections of the Interstate Commerce Act which are concerned with hearings. But, the words "*on the basis of such consideration*" plainly mean that the Commission must reach its conclusion only after it has considered, at least, the certain facts required to be collected by Section 1(14) (a). An extra burden is placed upon the Commission where, as here, the facts are in dispute.²⁸

At pages 18-19 of its brief, the government is willing to go so far as to concede that the words "on the record" can be "inferred from" or "implied by" the statute. We agree. But, we also say that there is no need to "infer" or "imply" here; the requirement of Section 1(14) (a) is clear.

Summarizing, Section 553(c) of the Administrative Procedure Act permits the Commission to engage in rulemaking "without opportunity for oral presentation" only if the proposed rules are not "required by statute to be made on the record after opportunity for an agency hearing." If the involved statute compels a hearing, with the Commission being permitted by Congress to reach its conclusion, as in Section 1(14) (a), only after considering evidence of a described nature, then subsection 553(c) tells that:

"* * * sections 556 and 557 of this title apply instead of this subsection."

Appellee Seaboard Coast Line urges that the language of Section 1(14) (a) is clear, and that Sections 556 and 557 of the Administrative Procedure Act govern this proceeding.

²⁸ 1 K. Davis, Administrative Law Treatise, §7.01, p. 411 and §7.02, pp. 412-415.

B. Congress Intended to Give the Protection of Sections 556 and 557 of the Administrative Procedure Act to Incentive Per Diem Proceedings.

The car-service provisions of the Interstate Commerce Act were added by the act of May 29, 1917, popularly known as the Esch Car Service Act.²⁹ That act "was passed in substantially the form recommended by the Commission."³⁰ Under its terms, and those of the subsequent Transportation Act of 1920 and a 1940 amendment, the Commission was authorized to lay down reasonable rules, regulations, and practices with respect to car service. Insofar as the present Section 1(14)(a) is concerned, only the first sentence was in existence until 1966.

The recent controversy in *Allegheny-Ludlum Steel* related to the Commission's powers under the Esch Car Service Act;³¹ that is, to the authority found in the first sentence of Section 1(14)(a) of the Interstate Commerce Act. When, in 1947, the Commission sought to use that authority to exert "economic pressure" on non-owning railroads (to apply incentives), it was told in *Palmer v. United States*:

"That is not the scheme of this statute. The statutory plan is that the interchange and return of cars are to be controlled by regulations designed and directed to that purpose,—operating regulations. And the rentals for cars, under whatever system of use and return may be established by the Commission, are to be reasonably compensatory for that use, and no more."³²

²⁹ *Investigation of Seatrail Lines, Inc.*, 206 I.C.C. 328, 340 (1935).

³⁰ "The Interstate Commerce Commission," I. L. Sharfman, Vol. I, at 146 (1931).

³¹ *United States v. Allegheny-Ludlum Steel*, U.S. , 32 L. Ed 2d 453, 458 (1972).

³² *Palmer v. United States*, 75 F.Supp. 63, 69 (D.C.D.C. 1947).

As a result of *Palmer*, and lacking the authority in the Esch Car Service Act to exert economic pressure in the form of incentive payments, the Commission for several years made annual recommendations to the Congress that it be permitted to assess penalties, or, in the alternative, incentive per diem, charges.³³ During the 18 years following *Palmer*, several bills were introduced in the Senate and in the House, and, finally, in 1966, Congress passed Public Law 89-430, giving to the Commission the authority now found in the second and third sentences of Section 1(14)(a) of the Interstate Commerce Act.

The legislative history, which is discussed next, shows why the Commission would say in its 1967 decision that it must consider the many factors noted in the second and third sentences and, "on the basis of such consideration," reach its conclusions; the Commission emphasizing, further:

"There is a substantial difference, however, between the information which warrants the issuance of orders requiring the movement of empty cars to an area of current scarcity and that which will support an order for the payment of funds by and between the respondent railroads. Section 1(14)(a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 USC § 551 et seq."³⁴

Reminded that this Court said in *Allegheny-Ludlum Steel* that it would "not suggest that only the precise words 'on the record' in the applicable statute will suffice to make §§ 556 and 557 applicable,"³⁵ there is ample legislative sup-

³³ *Hearings Before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce*, 89th Congress, 1st Session, Ser.89-23, at 4, 8-9, 14, 65, 201 (April 7-21 1965).

³⁴ *Incentive Per Diem*, 332 I.C.C. 11, 12, 14 (1967).

³⁵ *United States v. Allegheny-Ludlum Steel*, U.S. , 32 L Ed 2d 453, 465 (1972).

port for the Commission's recognition in its 1967 decision that the statutory language "on the basis of such consideration"³⁸ means that the ICC is required to record given facts and to make its decision on the basis of that record.

At the beginning of the Senate hearings which led to the passage of Public Law 89-430, the Chairman of the Interstate Commerce Commission, Commissioner Webb, told the Senate Committee on Commerce:

"If the proposed legislation is enacted, the Commission's first step would be to determine the extent to which particular railroads are deficient in car ownership. Some of the information required for such a determination is being developed in *Ex parte No. 241*.

"This proceeding was instituted by the Commission on December 20, 1963, to obtain specific and current information on the adequacy of freight car ownership and to formulate, if possible, more effective rules for the alleviation of car shortages. The first phase of this proceeding, which has been completed, indicates that inadequacy of ownership is not confined to any one particular type of freight car.

"A conclusive determination of the extent to which railroads are deficient in car ownership, such as would be required under the proposed legislation, would involve a comprehensive study of traffic requirements, including peak loadings. Separate studies would be required for particular types of equipment, such as box, gondola, flat, hopper, refrigerator, stock, and the other special types of cars. In addition, it would be necessary to consider the type and flow of traffic and whether the carrier in question is predominantly an originating, terminating, or bridge line.

"It should be emphasized that large net per diem debits do not necessarily indicate that the debtors are deficient in car ownership. Some railroads which supply great numbers of cars to the interchange fleet are net per

³⁸ 49 U.S.C. § 1 (14) (a), reproduced in Appendix 1a.

diem debtors. Other railroads terminate so much more traffic than they originate that they would be substantial net per diem debtors, even if they owned more cars than they needed.

"Conversely, it is conceivable that railroads which consistently show net per diem credits may not own enough freight cars of a particular type.

"Accordingly, if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates. We recognize that an indiscriminate increase in the number of freight cars would result in an uneconomic surplus of cars of various types and would result in wasteful transportation practices."³⁷

The same promise of "extreme caution" was made by Chairman Webb to the House Committee on Interstate and Foreign Commerce.

"Accordingly, we believe that the Commission should be clearly authorized to established per diem charges at a level or levels that would make ownership of equipment more attractive. The Commission should not be prevented from fixing per diem charges which would, in the language of the bills under consideration: '* * * provide just and reasonable compensation to freight car owners, contribute to sound car service practices and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.'

"It should be emphasized that large net per diem debits do not necessarily indicate that the debtors are deficient in car ownership. Some railroads which supply great numbers of cars to the interchange fleet are net per diem debtors.

³⁷ *Hearings Before the Freight Car Shortage Subcommittee of the Senate Committee of Commerce, 89th Congress, 1st Session, Ser. 89-23, at 14 (April 7, 1965).*

"Other railroads terminate so much more traffic than they originate that they would be substantial net per diem debtors even if they owned more cars than they needed.

"Conversely, it is conceivable that railroads which consistently show net per diem credits may not own enough freight cars of a particular type.

"We recognize that an indiscriminate increase in the number of freight cars could result in an uneconomic surplus of cars of various types and in wasteful transportation practices. Accordingly, if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates."²⁸

Once again, before the House Committee, the Commission's Chairman, promised great care and emphasized the part hearings would play in developing a record:

"In addition, I would like to point out that no sudden change in per diem charges would be effected by the proposed legislation. Section 1(14) of the act, as proposed to be amended, provides for hearings. The Commission's decision, after hearings, would be subject to judicial review.

"Hearings would be necessary in any event to determine, among other things, deficiencies by type of cars and by carriers, and the most equitable means of correcting these deficiencies.

"A comprehensive study of traffic requirements, including peak loadings, would be necessary. Separate studies would be required for particular types of equipment, such as box, gondola, flat, hopper, refrigerator, and other special types of cars.

"In addition, it would be necessary to consider the type and flow of traffic and the extent to which par-

²⁸ *Hearings Before the House Committee on Interstate and Foreign Commerce*, 89th Congress, 1st Session, Ser. 89-26, at 45 (October 5, 1965).

ticular carriers are originating, terminating, or bridge lines.

"In fixing the compensation to be paid for the use of freight cars, the Commission would have to determine what basis of compensation would provide a fair return on investment to freight car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

It would be necessary for us to determine whether the compensation should be computed on the basis of elements of ownership costs involved in owning and maintaining freight cars including a fair return on investment, whether compensation should include an element reflecting the value of use of freight cars, or whether it should be fixed upon some other basis or combination of bases.

"It would also be necessary to determine whether to prescribe incentive per diem rates industrywide, or to prescribe separate incentive rates for individual carriers by type of car."³⁹

The Chairman of the Senate Committee, Senator Magnuson, told the House Committee:

"I would like to make a start, and I would like the ICC in its wisdom, with proper hearings for these people [the railroads], with their problems—and they have problems, financial and otherwise—to be able to make a start on this, * * *."⁴⁰

Throughout the hearings on Public Law 89-430, the Congress was given every reason to believe that the Commission would consider the many factors involved in deciding upon

³⁹Id., pp. 45-46.

⁴⁰Id., p. 13.

a proper incentive. Congressman Meeds remarked, for example:

"The Interstate Commerce Commission has assured us that upon the passage of this legislation, they would make a thorough investigation to determine the problems which will be involved, and none of us here, certainly want to mitigate the seriousness of this problem to the railroads, either.

While it has been called a sectional problem, it is obviously a serious problem in which many factors have to be considered."⁴³

And, Congressman Mize said:

"A bill, S. 1098, has passed the Senate. It carries incentive amendments which should be included. There are some particular problems with respect to the terminal lines which must be recognized. We also must take into account those railroads which are doing a good job in maintaining an adequate fleet of freight cars. The Interstate Commerce Commission can take these items into consideration in setting realistic rates for freight car rental."⁴⁴

When the Chairman of the House Committee questioned the Chairman of the Interstate Commerce Commission, this was noted:

"The Chairman. If this additional authority that is given to you should be approved, would it permit you to start a program of at least providing an incentive, or encouragement for these cars to be constructed?

"Mr. Webb. Yes, Mr. Chairman. I assure you that we would begin immediately with our investigation, with hearings, with a view toward finding what level of

⁴³ Id, p. 30.

⁴⁴ Id, p. 34.

rates would be best designed to encourage car ownership."⁴⁴

A reading of the many pages of legislative history leaves absolutely no doubt that both the Congress and the Commission intended the exercise of extreme care in the prescription of incentive charges. And, when the Senate Committee reported out the proposed legislation, it was accompanied by a report which, among other things, noted:

"The major purpose of S 1098 is to insure the adequacy of the national railroad freight car supply. This objective is to be attained, not by arbitrary Government action, but by authorizing and directing the Interstate Commerce Commission, after hearing, to prescribe freight car rental charges (per diem) . . ."⁴⁵

Even after the enactment of Public Law 89-430, the Chairman of the Commission and the agency's General Counsel continued to express the Commission's understanding that, where compensation is involved, summary procedures will not do. One such occasion was an appearance before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, and some of that testimony was reprinted in the decision of the court below.⁴⁶ We won't repeat it here, but it makes clear the fact that summary procedures may be used under Section 1(15) of the Interstate Commerce Act, but that, where incentive compensation to be paid for the use of cars is involved, a full hearing is contemplated under Section 1(14)(a).

⁴⁴Id., p. 60.

⁴⁵Report of the United States Senate Committee on Commerce to Accompany S. 1098, Report No. 386, 89th Congress, 1st Session, at 4 (June 30, 1965).

⁴⁶*Florida East Coast Railway Company v. United States*, 322 F. Supp. 725, 729-732 (D.C. Fla. 1971) (J.S. App. 9a-15a).

We might note here that it is almost unreal for the government now to say⁴⁷ that credence cannot be given to testimony of Commissioners or their general counsel. And, surely, the two citations given by the government in support of that proposition are inapposite and lend no support whatsoever.

As following sections of this brief will illustrate, the Commission continued to believe in the need for fact-gathering hearings throughout the proceedings reported in the 1967 decision.

C. Consideration Should Be Given to the Fact that the Commission Has Never Doubted that Sections 556 and 557 Govern Here.

Until the writing of its brief this month, the Interstate Commerce Commission never once expressed doubt as to the applicability of Sections 556 and 557 of the Administrative Procedure Act to incentive per diem proceedings. While not determinative, this Court has given "great weight" to agency interpretations, and "the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."⁴⁸

Some five years ago, when it first considered the imposition of an incentive per diem under the then-new Section 1(14)(a), the Commission held oral hearings, had the benefit of briefs, and even heard oral argument. It did so, as it said in the very first sentence of its 1967 decision, because the new legislation of 1966 required the consideration of specified factors and because the Commission decision had to be reached "on the basis of such consideration."⁴⁹ And, it did so because, as it said, it recognized that "all the re-

⁴⁷ Appellants' brief, pp. 21-22, n. 6.

⁴⁸ *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940).

⁴⁹ *Incentive Per Diem Charges*, 332 I.C.C. 11, 12 (1967).

quirements of due process provided by the Administrative Procedure Act, 5 U.S.C. § 551 et seq." are applicable.⁵⁰ Finding, "*upon consideration of the record herein*" in the 1967 decision that the facts did not warrant the prescription of incentive charges, the Commission took care to point out that:

"Any alteration in the costs of transportation services, any diminution in their availability, produces repercussions throughout the entire structure. Thus, before we undertake to impose the charge authorized by P.L. 89-430, it is of the utmost importance that little, if any, doubt exist as to its necessity and effectiveness. As a former Chairman of this Commission observed before the Senate Freight Car Shortage Subcommittee in 1965, ' * * * if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates.' *Hearings on S.179 and S.1098, 89th Cong., 1st Sess., Serial No. 89-23, page 14.*"⁵¹

The Commission had, in fact, as we already have pointed out, promised the Congress that it "would exercise extreme caution" in using Section 1(14)(a). And, it did exercise such care in the first proceeding; in the 1967 decision.

It did not do so the second time. Rather, it acted hastily, under "Senatorial pressure," as Judge Simpson said here,⁵² or moved by "Senatorial spurs," as Judge Friendly put it in the *Long Island* decision.⁵³ Even so, there never was an expression by the ICC in the second proceeding, the one now

⁵⁰ *Id.*, p. 14.

⁵¹ *Id.*, pp. 13-14.

⁵² *Florida East Coast Railway Company v. United States*, 322 F. Supp. 725, 732 (D.C. Fla. 1971) (J.S. App. 16a).

⁵³ *Long Island Railroad Company v. United States*, 318 F. Supp. 490, 498 (D.C. N.Y. 1970) (J.S. App. 134a).

under review, that indicated anything other than a firm belief that Sections 556 and 557 governed.

At the beginning of that proceeding, the Commission made it quite clear that it intended to have a full hearing, including a prehearing conference, an oral hearing in Washington, and, perhaps, regional hearings. The Commission carefully told the parties that Sections 556 and 557 of the Administrative Procedure Act would govern. It said, further, in its convening notice:

*"It is ordered, That under authority of Part I of the Interstate Commerce Act (49 U.S.C. 1, et seq) more particularly Section 1(14)(a) and the Administrative Procedure Act (5 U.S.C. 553, 556 and 557) a proceeding be, and it is hereby, instituted for the purpose of implementing those provisions of the law relating to our authority to encourage the acquisition and maintenance of an adequate car supply as specified in Public Law 89-430."*⁵⁴

The hearings were never held. Instead, the Commission abruptly handed down an order which purported to be an "interim report,"⁵⁵ but which, as a practical matter, was the same order in all material respects as the final order, the one under attack here.

Commissioner Bush said, in the "interim report," that while the majority had handled the proceeding "in an expeditious manner," incentive charges couldn't be prescribed "until a hearing has been held as contemplated by statute."⁵⁶ Again, though, no such hearing was held.

Even so, the Commission continued to act with the under-

⁵⁴ Notice of Proposed Rulemaking. (App. 52).

⁵⁵ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 (1969) (J.S. App. 51a-84a).

⁵⁶ *Id.*, p. 194 (J.S. App. 62a).

standing that it must give protection beyond Section 553 of the Administrative Procedure Act, noting in its decision that it had "accord[ed] the parties a hearing under section 556 of that act."¹⁷

Nor has the Department of Justice acted differently. To begin with, it is observed that reference was made at pages 17-18 of the government's brief to the Attorney General's Manual on the Administrative Procedure Act (1947), but the inferences drawn by the government's brief are unfair. Actually, the Manual supports the Appellees' argument, as this language from pages 33-34 of the Manual will illustrate:

"The Interstate Commerce Commission and the Secretary of Agriculture may, after hearing, prescribe rates for carriers and stockyard agencies, respectively. Both types of rate orders are reviewable under the Urgent Deficiencies Act of 1913 (28 U.S.C. 47). Nothing in the Interstate Commerce Act, the Packers and Stockyards Act, or the Urgent Deficiencies Act requires in terms that such rate orders be "made on the record", or provides for the filing of a transcript of the administrative record with the reviewing court, or defines the scope of judicial review. However, both of these agencies and the courts have long assumed that such rate orders must be based upon the record made in the hearing; furthermore, it has long been the practice under the Urgent Deficiencies Act to review such orders on the basis of the administrative record which is submitted to the reviewing court. *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934); *Acker v. United States*, 298 U.S. 426 (1936). It appears, therefore, that rules (as defined in section 2(c) which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies Act on the basis of the evidence adduced at

¹⁷ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 219 (1970) (J.S. App. 87a); and Appellants' brief, p. 10.

the agency hearing, must be regarded as 'required by statute to be made on the record after opportunity for an agency hearing.' " (Emphasis added)

A reading of the government's Jurisdictional Statement makes perfectly clear, throughout, that the Department considered Sections 556 and 557 to govern the very questions being presented to this Court, but the government's position has been that the Appellees received their protection "under 556 of the Administrative Procedure Act." Beginning at page 23 of its brief to the court below, the government dedicated an entire section of its pleading to the argument that "THE COMMISSION GRANTED ALL PARTIES A FULL AND FAIR HEARING," giving full support there to the "detailed and scholarly" decision in *Long Island* which had concluded "that the third sentence of § 553(c) was applicable" and that Section 556 governs."⁴⁸

In summary, then, it comes as something of a surprise for the government now to argue, at page 15 of its brief, that it was all right for the ICC to reject the concept of a full and fair hearing, and to ignore "the resolution of any substantial factual dispute." That change of heart as to procedure fairness cannot be justified, as the government attempts, on the grounds of "the extreme displeasure voiced by Congress" over the Commission's lack of speed."⁴⁹

D. The Commission Failed to Give the Protection Afforded by Sections 556 and 557.

The court below held that, because the Commission did not heed the requirements of Section 556(d) of the Ad-

⁴⁸ *Long Island Railroad Company v. United States*, 318 F. Supp. 490, 497 (D.C. N.Y. 1970) (J.S. App. 131a).

⁴⁹ Appellants' brief, p. 22.

ministrative Procedure Act, the Seaboard Coast Line and the FEC were improperly refused a hearing and the right to cross examination. As a result, said the court, both parties "were prejudiced by the summary procedures of the Commission."⁶⁰ The law and the record in this proceeding support that finding.

1. **Prejudice Was Alleged and Shown by Appellee.** Section 556(d) of the Administrative Procedure Act affords each party to a hearing the right:

"* * * to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Further, it goes on to say:

"In rule making * * * an agency may, *when a party will not be prejudiced thereby*, adopt procedures for the submission of all or part of the evidence in written form." (Emphasis added)

Throughout the Commission proceeding, under review, the Seaboard Coast Line urged, and showed, that it would be prejudiced by the adoption of summary procedures.

The Commission suggested in its Jurisdictional Statement that the meaning of the word "prejudice" is not known.⁶¹ But, whatever it means, the government goes on to say that the Seaboard Coast Line did not prove it would be harmed.⁶² On the other hand, the Appellee has urged from the be-

⁶⁰ *Florida East Coast Railway Company v. United States*, 322 F. Supp. 725, 728 (D.C. Fla. 1971) (J.S. App. 7a).

⁶¹ Jurisdictional Statement, p. 17.

⁶² *Id.*, pp. 15-17. Also, appellants' brief, p. 24. For the purpose of argument only, Appellee accepts, but does not admit, that it had the burden of proving prejudice. Appellee will not comment upon the ICC's own responsibility to consider and avoid prejudicial action.

ginning that it was prejudiced by the Commission's failure to hold a full hearing. And, the court below, concluding that the factual situation in this case was quite different from that in *Long Island*, agreed that the Seaboard Coast Line and the FEC were prejudiced by the summary procedures of the Commission.⁶³

There is hardly any need to have the Court define the word "prejudice." Its meaning is clear. *Corpus Juris Secundum* says, for example:

"As a verb, the word 'prejudice' is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair; to cause any harm or damage or loss to; to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause; to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question." [Reference numbers omitted.]⁶⁴

All of the points noted in that definition apply here.

A party is prejudiced, or aggrieved, when a right is invaded by the act complained of and, as a result, the party suffers a loss.⁶⁵ Prejudice under the Administrative Procedure Act means the experiencing of undue difficulty in protecting an interest.⁶⁶ The test should be whether the complaining party had a fair opportunity to defend its position.⁶⁷

There was no fairness here. As the *Long Island* court

⁶³ *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 728 (D.C. Fla. 1971) (J.S. App. 7a).

⁶⁴ 72 C.J.S. 481.

⁶⁵ *Glos v. People*, 102 N.E. 763, 766 (1913).

⁶⁶ Compare *Deakyne v. Commissioners of Lewes*, 416 F.2d. 290, 300 (CA3 Del. 1969).

⁶⁷ *Ibid.*

pointed out,⁶⁸ the facts from which the Commission reached its conclusion were based upon data obtained during "an investigatory-research program" from "sampling procedures developed and administered by our [the ICC's] staff." On the basis of data developed internally, the Commission issued an "interim report," following which, after a decent period of time during which parties were given their only opportunity to comment, it solemnly confirmed its "interim report." If nothing else, the Commission's fixed anticipatory judgment shown by the so-called "interim report," as contradistinguished from interim opinions which might yield to real evidence, shows solid prejudice.⁶⁹ In view of the determined way in which the ICC proceeded, perhaps it is true that it was "extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order,"⁷⁰ as the ICC has admitted to this Court. There was then, and is now little doubt that the "interim report" was to be, in reality, the Commission's ultimate decision. But, even if the ICC had sufficient information upon which to base that "interim report," which it did not have, the Seaboard Coast Line at least was entitled to try to change the Commission's mind, and it was entitled, as it asked,⁷¹ to try to test some of the unexplained conclusions in the "interim report." Without that opportunity it was harmed, or, as the statute says, "prejudiced."

In many ways this prejudice goes back several years, and it is pertinent, Appellee believes, to consider the Commis-

⁶⁸ *Long Island Railroad Company v. United States*, 318 F.Supp. 490, 493. (D.C. N.Y. 1970) (J.S. App. 124a).

⁶⁹ Compare *Schipper & Block, Inc. v. Carson Pirie Scott & Co.*, 256 N.E. 2d 854, 857 (1970).

⁷⁰ Jurisdictional Statement, p. 15.

⁷¹ *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733, 736 (D.C. Fla. 1971) (J.S. App. 19a, 29a).

sion's past attitude with respect to car ownership by the railroads.

As the record in this case now shows, several years ago, on April 26, 1962, one of the Commissioners, noting that a shipper should not be made to "fit his products into a few basic types of cars, such as box, gondola, and flat cars," quite properly recognized the need for "cars to meet shippers' specialized needs," and he remarked that "[r]ailroads are realizing the possibilities inherent in specialized equipment for affording more attractive service to shippers." Then, in the very year in which it handed down its "interim decision" the Commission expressed the same feeling when, in the proceeding involved in *Allegheny-Ludlum Steel*, in speaking of the equipment demands of shippers, it said:

"The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying."

It went on to say:

"One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines, is apparently being ignored. Such a situation we find to

be unconscionable and one that must not be continued."¹²

As pointed out earlier in this brief, when the then-Chairman of the Commission testified before the Senate's Committee on Commerce on April 7, 1965, with respect to the enactment of Public Law 89-430, he pointed out that "each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in numbers to protect the loadings it originates."

Until the service of the "interim report," the Seaboard Coast Line had every reason to believe that it could rely upon past Commission-stated objectives and upon its own business requirements with respect to car types. Nor had the Seaboard Coast Line been warned otherwise in the first Commission decision under the 1966 amendment to Section 1(14)(a). In fact, the Commission emphasized in the 1967 decision that in many respects "the standard boxcar has been replaced."¹³

After the 1967 decision, the Commission commenced its study leading to the decision which is under attack here. That study consisted of sampling data, only, which the railroads were required to submit to the Commission for an 11-month period in 1968. The Commission clearly stated the data was not designed to develop the causes of any inadequacy in car supply.¹⁴

Based upon that data, as well as material from the Internal Revenue Service obtained from outside the record, and, possibly, other information not known yet to Appellee,

¹² *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 286, 287 and 290 (1969).

¹³ *Incentive Per Diem Charges*, 332 I.C.C. 11, 15 (1967).

¹⁴ Appendix C to Joint Answer of the Commission. (App. 46).

the Commission established the incentive payments which are the subject of this proceeding. This was all done without oral hearings and without any real knowledge on the part of the railroads as to what the Commission was doing. Appellee was prejudiced by the fact that it wanted, but was never afforded, the requested opportunity to cross-examine the only persons, Commission personnel, who could be tested as to the sampling data which apparently formed the basis of the ICC conclusions.

The Commission argues that those on its staff who prepare factual material used in a proceeding cannot be questioned.⁷⁵ It is wrong. We do not quarrel with the government's assertion that we may not probe the Commission's mental processes; we did not, and do not, seek to do so. But, Section 556 does permit us "such cross-examination as may be required for a full and true disclosure of the facts." And, in proceedings in which evidence is given by employees of the ICC, those witnesses may be, and are, cross-examined.⁷⁶

The Seaboard Coast Line was prejudiced, further, by the lack of proper notice. It developed that, under the Commission's order, the railroads are required to make payments which range upward to \$12.98 a day, but the incentive payments are to be made for plain boxcars only. At no time during the course of the Commission's study was the Seaboard Coast Line even aware of the Commission's inclination to restrict the incentive payments to plain boxcars. The Notice of Proposed Rulemaking which began the dis-

⁷⁵ Appellants' brief, pp. 25-26.

⁷⁶ One such instance was the Section 1 (14) (a) per diem proceeding in *Chicago, B. & Q. R. Co. v. New York, S. & Western R. Co.*, 332 I.C.C. 176 (1968); another, the Commission case with which this court treated in *United States v. Allegheny-Ludlum Steel, U.S.*, 32 L. Ed 2d 453 (1972); and yet another was the 1967 incentive proceeding in *Incentive Per Diem Charges*, 332 I.C.C. 11.

puted proceeding⁷⁷ related to all types of freight cars. It was not until the so-called "interim report," which as a practical matter, was the final order too, that the parties, for the first time, learned this fact:

"We limit our discussion to plain boxcars. The problems in other areas may well be as severe, but their magnitude is not. The size of the national boxcar fleet vis-a-vis other types of freight cars persuades us that boxcars require our separate attention. Our study of other types of cars continues."⁷⁸

So, after telling this Appellee in various ways for some time that it should tailor its car fleet to suit the needs of the shippers on its line, the Commission's order, entered without any effective opportunity to rebut it, penalizes the Seaboard Coast Line for following the Commission's admonition. That is, most of the new cars which the Seaboard Coast Line have acquired have been equipped to meet the needs of its shippers; those cars are boxcars, but they are more expensive to own and more costly to maintain than plain boxcars. Now the Seaboard Coast Line is deprived of necessary dollars because it does not have sufficient unequipped cars of the type—not which it needs—but which other railroads need to meet the requirements of their shippers. This comes about because the Commission's incentive per diem order applies only to unequipped, plain boxcars. When a plain boxcar from another railroad is on the lines of the Appellee, the latter will pay an incentive charge; when the Appellee's equipped boxcars are on the lines of the other carrier, often performing the same service there as plain box cars, the Seaboard Coast Line receives no incentive in return.

⁷⁷ App. 52-53.

⁷⁸ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198 (1969) (J.S. App. 66a).

Had the Commission followed the requirement of Section 553(b)(3) of the Administrative Procedure Act, and included in its Notice the terms or substance of the proposed rule, Appellee would have been in some position to have addressed itself to the impropriety of favoring owners of plain boxcars over owners of equipped boxcars. It was, therefore, prejudiced by the Commission's failure to permit a test of whatever Commission thinking led to the penalties against those lines which paid heed to the earlier ICC pronouncements that local shipper needs should be met.

As a result of the application of this order to a specific type of boxcar only, the Appellee will pay more in incentive charges than it will receive. In fact, it will pay a great deal more. Its damage—its net loss—for the six-month period of each year during which incentive per diem will be in effect will be some \$1,850,000. The incentive per diem experiment now is in its third year.

After the Commission's "interim report" was handed down, the Seaboard Coast Line asked for time in which to assess the effect of the decision, and it sought a hearing to show the harm which the order would cause to its equipment program. Both requests were rejected summarily by the final Commission order, the one now under attack.

It is untrue, as the Commission now has told this Court, that "Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased."⁷⁹ The Seaboard Coast Line's statement, to the contrary, clearly told the Commission what was unexplained in its "interim report" and stated some of the things which needed to be tested at an oral hearing.

Regardless of what the government now says, had the Seaboard Coast Line had an opportunity to cross-examine,

⁷⁹ Jurisdictional Statement, p. 8; and Appellants' brief, p. 8.

and explore, the reasoning behind the Commission's report and order, it feels that it would have been able to convince the Commission that the record did not support its conclusions. It did not have that opportunity and, thus, it was prejudiced.

The principal mistake made by the Commission in its order, that is, the conclusion that boxcars would be returned quicker to the owning lines if some incentive over the basic per diem could be applied, would have been avoided had there been a hearing. This Appellee can make that statement in a positive manner because there is nothing in the Commission's record to support the Commission's conclusion. Indeed, so far as Appellee is aware, most, if not all, of the evidence of record is to the contrary. Any hearing would have developed the fact that incentive charges could not induce the Seaboard Coast Line to return cars faster than it does at present. But, how can you test opinions of ICC personnel without examining them?

When the Seaboard Coast Line asked the Commission for a hearing in its statement of March 17, 1970,⁸⁰ it pointed out that the Commission's "interim report" had expressed a desire to "produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars." Appellee has been diligent in acquiring equipment to meet the needs of its shippers, and is a creditor road, yet the Commission's order will penalize the Seaboard Coast Line and will not send to it any "flow of funds." Instead, when it had its only opportunity to comment upon the "interim report," the Seaboard Coast Line pointed out that its necessarily-hasty study showed that it will lose "in excess of \$1.5 million each year

⁸⁰ *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 735 (D.C. Fla. 1971) (J.S. App. 24a).

as a result of the Commission's 'experiment,' to the detriment of its car supply program." As soon as the Seaboard Coast Line's studies were completed, it learned that its annual loss would be in the amount of \$1,850,000. The Commission's mistaken belief that such a creditor line as the Seaboard Coast Line would benefit from any "flow of funds" could have been avoided if the usual safeguards had been taken. We cannot believe it "unlikely" that the Commission's conclusions would have been different if someone at the ICC had been tested on cross-examination about that vital point.

Further, it is clear from a reading of the Commission's decision that shipper and carrier interests in the Southeast (that part of the country referred to by the Commission in its report as Zone 3) received no real consideration in this proceeding. The Commission pointedly confined itself to the plain boxcar needs of the Midwest, acknowledging that "problems in other areas may well be as severe," but concluding that it would continue its study in the other areas until some other time.⁸¹ The Seaboard Coast Line very carefully called the Commission's attention to that flaw, and was prejudiced by the fact that the Commission overlooked it in its final treatment of the problem. Since the Commission would have had to face careful examination on that point at an oral hearing, the lack of such a hearing, on a point about which only the ICC's representatives could answer questions, was damaging to the Seaboard Coast Line. That failure would have been remedied by a full hearing. And, it is not enough for the Commission to suggest that it will conduct some future study insofar as other railroads are concerned because, while that study is going on, the Seaboard

⁸¹ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198 (1969) (J.S. App. 66a). By "other areas" the Commission appears to mean "other types of cars." There has been no such study.

Coast Line's car supply program will suffer and its financial position will be eroded.

As Appellee told the Commission in its Statement of Position, the lack of time and proper hearing placed it "before the Commission without a real chance to present detailed verified statements."²²

If, then, it is necessary that Appellee show that it was prejudiced by the procedure followed by the Commission, the Seaboard Coast Line showed harm at each juncture of the Commission proceeding.

2. An Oral Hearing Was Required Here. If the Appellees have shown this Court that they were prejudiced by the Commission's summary handling of the incentive per diem proceeding then, as pointed out in the preceding section of this brief, the language of Section 556(d) of the Administrative Procedure Act comes into play. It provides that, in rulemaking, the Commission may "adopt procedures for the submission of all or part of the evidence in written form" *only if* "a party will not be prejudiced thereby." But, if a party is disadvantaged by the exclusive use of written testimony, then Section 556(d) permits either the submission of oral evidence or "cross-examination as may be required for a full and true disclosure of the facts" or both.

The Commission went outside of the record here for some of the evidence used in reaching its conclusions, but, otherwise, it took all of the evidence in "written form." The oral hearings which were requested were denied the parties, and that constituted error on the Commission's part.

Before commenting on that point, however, this Appellee believes that it did not even need to show prejudice, because Section 556(d) also provides that the parties "are entitled" to certain rights, whether they are prejudiced or not, and

²²*Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733 (D.C. Fla. 1971) (J.S. App. 20a).

one of those rights is to "such cross-examination as may be required for a full and true disclosure of the facts."⁸³ Had the Commission worked in the open in this proceeding, as it normally does, and had it made the proposed incentive per diem rules available to the railroads for proper study and subsequent cross-examination of those persons responsible for whatever "evidence" was developed by the Commission's staff, it is likely that the Seaboard Coast Line would not be before this Court.

In any event, as the lower court found,⁸⁴ it having been made clear that the Appellees would be harmed by the Commission's summary procedures, and since each Appellee had "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony" (thus bringing this case "within the exception expressed in *Long Island*"), they were entitled to the protection of Section 556(d) of the Administrative Procedure Act. Both the court below and the *Long Island* court ought to be upheld in this regard.

This oral-hearing concept is not new to the Commission, for in the 1967 decision, after noting that it must "exercise extreme caution," the ICC itself said it should be followed.⁸⁵ Indeed, when acting under Section 1(14)(a) of the Act in

⁸³ *Long Island Railroad Company v. United States*, 318 F.Supp. 490, 498 (D.C. N.Y. (1970) (J.S. App. 134a-135a), does not agree with this Appellee on that point, but that court failed to consider all of Section 556. The only reason why the court disagreed with The Long Island Rail Road that, at least, the Commission should have held oral hearings to test the Commission's evidence, was the Long Island Rail Road's failure to have "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony." But, that is not what Section 556 (d) says; it gives the parties the positive right to cross-examine and to rebut. For example, 2 K. Davis, *Administrative Law Treatise* § 14.15.

⁸⁴ *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 728-729 (D.C. Fla. 1971) (J.S. App. 7a-8a).

⁸⁵ *Incentive Per Diem Charges*, 332 I.C.C. 11, 14 (1967).

the past, even before the passage of Public Law 89-430 in 1966, the Commission consistently afforded oral hearings. In addition to the only other incentive per diem proceeding under the 1966 law, there were many such cases under Section 1(14)(a) prior to 1966.⁸⁸

In two of its decisions⁸⁷ the Commission appears to support our definition of the words "agency hearing" as used in Sections 553, 556 and 557 of the Administrative Procedure Act. At page 606 of *National Trucking* it said:

"The word 'hearing' is not specifically defined in the procedure act, but it is clear from the manner in which that term is used therein that the reference is to oral hearings only and not to proceedings conducted under the Commission's shortened or modified procedure."

In *Reliance*, it went on to verify the right to test evidence by cross-examination, and then cited two decisions of this Court, *Louisville* and *Morgan*.⁸⁹ The Commission took the position in *Louisville*, as noted at page 93 of this Court's decision, that it could act on data collected by it "even though not formally proved at the hearing." This Court wouldn't agree, saying:

"But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the

⁸⁸ A few out of many are *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969); *Chicago, B. & Q. R. Co. v. New York, S. & Western R. Co.*, 332 I.C.C. 176 (1968); *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659 (1947); *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.*, 248 I.C.C. 109 (1941); *Rules for Car-Hire Settlement*, 165 I.C.C. 495 (1930); *Marcellus & Otisco Co. v. N.Y.C.R.R.Co.*, 104 I.C.C. 389 (1925); and *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923).

⁸⁷ *Reliance Steel Products v. Baltimore & O.R.Co.*, 291 I.C.C. 695 (1954); *National Trucking & Storage Co., Inc. v. Pennsylvania R. Co.*, 294 I.C.C. 605, 606 (1955).

⁸⁹ *Interstate Commerce Com. v. Louisville & N.R.Co.*, 227 U.S. 88 (1913) and *Morgan v. United States*, 304 U.S. 1 (1938).

party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.

* * *

"The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties.

* * *

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown, but presumptively sufficient information to support the finding."

Later, in often-cited *Morgan*, this Court dealt with a statute which, in this Appellee's opinion, is less positive as to the need for a hearing on the record than Public Law 89-430. In doing so, at pages 14 and 15 the Court confirmed the need for "a fair and open hearing" by pointing out:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that

in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

In *Ohio Bell*⁸⁹ this Court pointed out, too, that not only is there a right to a fair hearing, but that "[t]here can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay." Then, citing *Morgan*, this Court said in *Willner*:⁹⁰

"Those who are brought into contest with * * * Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Just why the Commission should have conducted a full hearing in this case, as required, and the mistakes which can result when a major decision such as *Incentive Per Diem*—1968 is treated in summary fashion, will be discussed later.

3. The Commission Failed to Observe the Requirements of Section 1(14)(a). The court below noted that this Appellee had charged that the Commission had failed to comply with the requirements of Section 1(14)(a), but said:

⁸⁹ *Ohio Bell Teleph. Co. v. Public Utilities Com.*, 301 U.S. 292, 304-305 (1937).

⁹⁰ *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 105 (1963).

"Since we find that the Commission acted illegally in denying the plaintiff railroads a hearing before the imposition of the incentive per diem charges, we pretermitt discussion of all but the first point."¹¹

We renew our charge.

The Commission is perfectly aware of its responsibilities in utilizing the authority found in Section 1(14)(a). In its 1967 decision it said:

"Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. We have observed that the adequacy of the national freight car fleet depends upon the interplay of a number of factors, none of which can be said to be of superior importance. Further, since the effect of an incentive charge must be produced over a future period, consideration must be given to possible changes in these factors. In recent years many innovations and improvements have taken place in car design and operation.

* * *

"Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide

¹¹ *Florida East Coast Railway Company v. United States*, 322 F. Supp. 725, 727-728 (D.C. Fla. 1971) (J.S. App. 5a).

review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor."²²

Those responsibilities, and those factors, recognized in the 1967 decision—and recalled as late as pages 5 and 6 to the government's brief to this Court—were sidetracked here.

a. *The Order Is Arbitrary, Not Reasonable.*

The very first admonition of Section 1(14)(a) is that any prescribed rule, regulation or practice must be "reasonable." And, Section 706 of the Administrative Procedure Act requires a reviewing court to hold unlawful any agency action found to be arbitrary.

The rules prescribed in the ICC decision now under attack are considerably less than reasonable, a fact which could have been made plain to the Commission had a hearing been conducted. The Seaboard Coast Line sought to be heard for, among other reasons, the purpose of explaining to the Commission why its rules would be harmful to the railroad and why, in turn, they would result in a worsening of the car supply situation with respect to Seaboard Coast Line shippers. In that regard, if it was reasonable for the Commission to give "first priority to the boxcar,"²³ it certainly was unreasonable to consider only "plain" boxcars and to refuse consideration of other types of boxcars, many varieties of

²² *Incentive Per Diem Charges*, 332 I.C.C. 11, 14-15 (1967).

²³ *Ibid.*

which serve the same purpose. The Commission, itself, had made that clear in its 1967 report.

Nor did the Commission give consideration to the "services currently desired by the shipping public" in the Southeast, or to "the interplay of a number of factors" of which it spoke in its 1967 decision. Instead, it handed down an arbitrary requirement which failed to consider other than a limited number of factors.

Then, Section 1(14)(a) requires that any rule with respect to "the compensation to be paid" also must be reasonable. Although the Seaboard Coast Line questioned the scale of incentive charges prescribed by the Commission, the ICC has yet to show that the various levels of incentive charges are based upon good reason. We are, of course, pleased that the Commission recognizes that the level of the charges is questionable and that the proceeding will remain open for new information as experience is gathered,⁹⁴ but the Commission's conclusion clearly is not reasonable. It is not enough to say that the charges are placed at the present arbitrary level in order to give owners of unequipped boxcars "returns on investment * * * comparable to the higher average returns earned by non-regulated corporations."⁹⁵ Aside from the fact that the Commission stated that it reached this conclusion on untested data from beyond the record, there can be no good reason why investments in unequipped boxcars should receive higher rates of return than those on the more-costly equipped boxcars or on other types of rail equipment.

⁹⁴ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 225 (1970) (J.S. App. 93a).

⁹⁵ *Id.*, p. 224 (J.S. App. 92a).

b. The National Car Supply Was Not Considered.

Section 1(14)(a) requires the Commission to "give consideration to the national level of ownership of such types of freight car *and* to other factors affecting the adequacies of the national freight car supply." (Emphasis added) The Commission gave consideration to the "level of ownership" of a type of freight car, plain boxcars, but it did not do so on a "national level." In reporting the results of the freight car study which it had conducted, the Commission showed that it had studied only zone 2 and zone 4 carriers.⁹⁶ Appellee is primarily a zone 3 carrier, and little, if any, consideration was given to its territory. The national level was not even considered so far as we can determine from the Commission's decision.

c. Other Section 1(14)(a) Factors Were Not Considered.

There was another very important omission by the Commission. The statute requires not only that the ICC consider the national level of ownership of—in this case—plain boxcars, but it also must consider "other factors affecting the adequacy of the national freight car supply." So far as we can discern, no consideration was given to "other factors." Of particular concern to the Seaboard Coast Line, the ICC ignored the impact of the new Commission requirements on the supply of equipped boxcars or on other types of equipment.⁹⁷ And, there was no thought given to "the extent to which the transportation service [one type of car

⁹⁶ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198-202 (1969) (J.S. App. 66a-70a).

⁹⁷ At page 7 of its brief, the government says that the S.C.L. "firmly opposed" a "Commission proposal for further study of additional types of freight cars". That assertion is false.

performs] is or can also be provided by cars of other types," to use the Commission's words from its 1967 decision. Further, the Commission considered rules only for plain boxcars, even though it also found, inconsistently, that problems with other cars "may well be as severe." It admits that its study is incomplete, saying that it must in the future look to see whether other types of freight cars are interchangeable with plain boxcars.⁹⁹ The record in the 1967 proceeding shows that they are.¹⁰⁰

d. *The Commission Ignored Its Own Views of the Requirements of the Statute.*

The Commission failed to heed the statutory requirement that it consider the "national level of ownership." It ignored the effects of its rules on the freight car supply in other segments of the country. Indeed, it ignored its own 1967 admonition:

"Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. They cannot be founded in conjecture and this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously."¹⁰⁰

Because the Commission did act capriciously, and because the order under attack does not comport with the requirements of Section 1(14)(a), it should be set aside by this Court for reasons not even reached by the court below.

⁹⁹ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 228 (1970) (J.S. App. 96a).

⁹⁹ *Incentive Per Diem Charges*, 332 I.C.C. 11, 15 (1967).

¹⁰⁰ *Id.*, pp. 16-17.

4. **The Commission's Decision Lacks Necessary Findings and Conclusions, and the Reasons or Basis Therefor.** Section 556 of the Administrative Procedure Act requires "reliable probative, and substantial evidence" as support for Commission-prescribed rules. Section 557 places upon the Commission the burden of showing in its decisions "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." Section 706 of that Act also tells the reviewing courts that they shall set aside any agency decision which is arbitrary and unsupported by substantial evidence.

Some years ago, this Court said, in *Louisville*,¹⁰¹ that:

"A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.'"

That has been a consistent requirement throughout the years. It was restated in *Burlington*, where this Court went on to state that:

"Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"¹⁰²

It has been said, correctly, that:

¹⁰¹ *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U.S. 88, 92 (1913).

¹⁰² *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962). Also, annotation references 2 and 3 in the *Burlington* decision as reported in 9 L Ed 2d 207. Particularly strong is *Aberdeen and Rockfish Railroad Co. v. United States*, 270 F.Supp. 695 (D.C. La. 1967), *aff'd. Baltimore & O. R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87 (1968), and *Palmer v. United States*, 75 F.Supp. 63, 75-76 (D.C. D.C. 1947).

"It is not enough that some suggestion of a reason should 'lurk' in the Commission's report; a reviewing court cannot uphold an order on a ground which the Commission has not made sufficiently plain that the court can be sure the Commission meant to act upon it and had a factual basis for doing so."¹⁰³

Nor will it do for the ICC to confess, as it did on page 7 of its brief to this Court, that it was moved to a decision by an "impatient" Congress which "emphatically expressed the opinion that the Commission had sufficient information upon which to act."

The fact of the matter is that there are neither reasons, findings, nor evidence to support the Commission's conclusions here. Therefore, the Commission's decision should be rejected. But, the court below found it unnecessary to consider this flaw in the ICC's work because of the court's finding that a hearing should have been held.

a. The Evidence Cannot Support a Conclusion That Incentive Charges Will Improve Operating Practices.

The most glaring error in the Commission's entire decision relates to the principal objective of incentive per diem charges, it being the purpose of those charges to spur the railroads into returning boxcars to the owning lines as quickly as possible, and to the Commission's failure to make clear why it now has reversed its 1967 conclusion that incentive per diem won't help.

In its 1967 report, the Commission made clear that it was "not satisfied, on this record, that addition of an interim incentive charge" would have such an impact as to improve

¹⁰³ *New York Central Railroad Co. v. United States*, 207 F.Supp. 483, 496 (D.C.N.Y. 1962).

present operating practices.¹⁰⁴ Later, it acknowledged that conclusion in the proceeding now being considered.¹⁰⁵ Nevertheless, without any facts of record to bolster its new conclusion, and without stating in the decision its support for the conclusion, the Commission turned itself about and surmised that incentive per diem "should tend to speed up the use and movement of cars."¹⁰⁶ If, as we charge, this conclusion of the Commission cannot be supported by evidence of record, and if, in fact, as we say, the only evidence is to the contrary, then the entire order must fail because its underpinnings are gone and it will serve no reasonable purpose.¹⁰⁷

b. Contrary to the ICC's Conclusion, There Is a Clear Showing that the Charges Will Unduly Burden the Seaboard Coast Line.

Even if it appeared that the incentive charges would not serve their purpose, the Commission felt that its proposal was worth trying because, after all, "the proposed charges would [not] impose an undue burden on [any railroad opponent] or on any group of carriers."¹⁰⁸ This conclusion is not, and cannot be, supported.

Although the Seaboard Coast Line was not given an opportunity to show the full scope of the loss which it would experience, it did give evidence that it would lose "in excess of \$1.5 million" for each six-month period that the disputed scale of charges is in effect. Other railroads, including the

¹⁰⁴ *Incentive Per Diem Charges*, 332 I.C.C. 11, 16 (1967).

¹⁰⁵ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 185 (1969) (J.S. App. 53a).

¹⁰⁶ *Id.*, p. 186 (J.S. App. 54a).

¹⁰⁷ *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

¹⁰⁸ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 224, n. 8 (1970) (J.S. App. 92a).

FEC, showed that the proposed charges would be harmful. Regardless of the showing made by others, the loss which will be experienced by this Appellee constitutes an "undue burden," and any conclusion to the contrary is faulty and without support.

In its only direct response to any Seaboard Coast Line objection, the Commission said that the Seaboard Coast Line is not going to be penalized for owning better boxcars because it will receive a greater basic per diem rate "when its equipped, expensive, and more modern boxcars are on other lines." "It," said the Commission of the Appellee, "overlooks the scale of basic per diem charges, which provide larger per diem payments for the more modern and more expensive cars."¹⁰⁰ This is a most inexpert response for an expert agency to make, for the Commission knows that basic per diem is based upon ownership costs; incentive per diem is not. Whether we're considering 40-year-old plain boxcars or brand-new equipped boxcars, basic per diem returns to the owner of either kind of car only enough to meet its ownership costs. Incentive per diem is something else; it's an additional charge over and above the basic per diem rate. The Seaboard Coast Line won't receive incentive per diem for its more expensive cars, but the owners of plain boxcars will. Thus, when the netting out of interline accounts takes place, the Seaboard Coast Line will come up short—because of the Commission's order—some \$308,333 each month, or, \$1,850,000 at the conclusion of each six-month period.

¹⁰⁰ Id., pp. 223-224 (J.S. App. 91a-92a).

*c. There Is no Support for the Commission's Conclusion
that the Seaboard Coast Line Will Benefit from
the Order.*

Aside from the hoped-for improvement of operating practices, the only other stated purpose of the incentive charges is to penalize railroads which will not buy sufficient quantities of plain boxcars and give funds to creditor railroads which do buy them. The Commission said that the incentive charges will "produce a steady annual, although not perennial, flow of funds to the creditor per diem railroads with which they can purchase additional plain boxcars."¹¹⁰ Our answer to the Commission was, and is, that the Seaboard Coast Line, acting in conformity with prior demands of the Commission and of good business practice, has been diligent in acquiring equipment, including boxcars, to meet the needs of its shippers; and it is a creditor road. At the only opportunity given to it, the Commission was told these things by this Appellee.¹¹¹ Clearly, then, the Commission's conclusion is wrong, for the Seaboard Coast Line, a creditor road, will be penalized and will not be the beneficiary of any "steady annual * * * flow of funds."

Equally erroneous is the Commission's conclusion that "the incentive charges should bring distinct economic benefits."¹¹² There is something wrong with this statement on its face, because Appellee is going to have some \$1.85 million lifted from its pockets each year. So, obviously, the conclusion is incorrect insofar as the Seaboard Coast Line is concerned. Nor can the findings be propped up by the extra-record

¹¹⁰ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 186 (1969) (J.S. App. 54a).

¹¹¹ *Florida East Coast Railway Company v. United States*, 322 F. Supp 725, 733-736 (D.C. Fla. 1971) (J.S. App. 17a-27a).

¹¹² *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 190 (1969) (J.S. App. 58a).

support of some data obtained by the Commission from the Internal Revenue Service, as the ICC has tried. Without doubt, some railroads will experience "distinct economic benefits" as a result of the order; others will not.

Further, shippers in Seaboard Coast Line territory will suffer. The railroads of the Midwest, which need the plain boxcars for their shippers, will, under the Commission's incentive plan, receive the "distinct economic benefits" of which the ICC wrote. That is, they will obtain additional plain boxcars, those cars being paid for by the Seaboard Coast Line, among others. Since the latter must buy plain boxcars for other railroads, it must, naturally, reduce its expenditures for new cars needed by its own shippers. This is the kind of "interplay" which was so important to the Commission in its 1967 decision, but which, in its haste, it forgot in 1970.

d. *The Commission's Evidence Is Incomplete.*

The decision under attack states, strangely, that "[t]he critics of the [1968] study point to no specific weakness in it."¹¹³ This conclusion of the Commission is wrong. At every opportunity—at the beginning, in the middle, and at the end of the study—this Appellee did criticize the study as being inadequate. As noted earlier, the Commission failed to take into consideration the southeastern states, the needs of shippers in that territory, and the type of boxcar equipment used by rail customers there. Very important, it did not consider, as it once said it must, that equipped boxcars often are used interchangeably with plain boxcars. And, in sum, it did not heed its own 1967 admonition that its "[c]onclusions in this area must rest upon consideration of

¹¹³ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 221 (1970) (J.S. App. 89a).

economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program." In fact, the only real objective of the Commission's study here was "to develop data relating to the supply and demand conditions of the railroads in the United States and their performance in satisfying such demand."¹¹⁴ Numbers, not reasons, were studied. And, numbers cannot support the Commission's conclusions in this proceeding.

e. Contrary to Its Finding, the Commission Ignored Material Objections.

Then, the Commission concluded that, for the most part, those parties critical of its order, "do not raise material or substantial allegations of error in that report."¹¹⁵ The facts are to the contrary. It would be safe to say that virtually all of those critical of the decision raised "material allegations." Certainly, this Appellee did. Its allegation of substantial harm is quite material, yet it was brushed aside for the clear purpose of rushing the Commission's "experiment" into practice.

f. The Level of the Incentive Charges Has No Support of Record.

A very important aspect of the Commission's decision is its treatment of the level, or amount, of the incentive per diem charges.

Although it finds "that the 1968 study provides us with adequate data to support the action taken in this report and

¹¹⁴ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 197 (1969) (J.S. App. 65a).

¹¹⁵ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 220 (1970) (J.S. App. 88a).

order,"¹¹⁶ the Commission confesses that the order is only a "tentative approach to the appropriate amount of incentive."¹¹⁷ The method by which the Commission arrived at this "tentative approach" is described in the "interim report," the Commission being quite candid in stating that the basis for its conclusion is extra-record data collected by the Internal Revenue Service showing the profitability of corporations generally in 1966.¹¹⁸ Aside from the fact that the Commission has gone beyond the record, the "tentative" charges bear absolutely no relationship to the proper levels necessary to meet the Commission's objective. The Commission's approach does not take into consideration the needs of all of the carriers, and it will lead to unnecessary, irreparable harm to some railroads. The Seaboard Coast Line brought this to the Commission's attention at the only opportunity which was given to the parties, but the Commission's only response was that it would wait until after "actual experience" before it would "determine the precise effect" of the decision.¹¹⁹ That comment is not such "substantial evidence" as will support the far-reaching, damaging results of the order. Furthermore, the Commission's statement flies directly in the face of its earlier conclusion that "before we undertake to impose the charge * * *, it is of the utmost importance that little, if any, doubt exists as to its necessity and effectiveness."¹²⁰ The Commission had more information in its 1967 proceeding about the level of charges than it had in the proceeding here under attack.

¹¹⁶ *Id.*, p. 223. (J.S. App. 91a).

¹¹⁷ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 187 (1969) (J.S. App. 55a).

¹¹⁸ *Id.*, pp. 187-189 (J.S. App. 55a-57a).

¹¹⁹ *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 225 (1970) (J.S. App. 93a).

¹²⁰ *Incentive Per Diem Charges*, 332 I.C.C. 11, 14 (1967).

but, as the ICC admits at page 6 of its brief to this Court, it did not even then have "reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards." Here, it had *no* information of record.

5. Procedural Shortcuts Could Destroy Due Process at the Interstate Commerce Commission. One of the purposes of the Administrative Procedure Act is to assure procedural due process of law.¹²¹ In such property matters as rates and the exchange of vital revenues, it would not now be wise to give to any regulatory agency the almost limitless power of decision-making based solely upon its expertise. Yet, the Commission, if granted its demand for relief from Sections 556 and 557 of the Administrative Procedure Act in this proceeding, would have that power available.

That charge is exemplified in the continuing problem of divisions of revenue between railroads.

This Court is familiar with the controversy which it looked into in the 1968 *Official-Southern Divisions* proceeding,¹²² a proceeding of general application in which the Commission, without supporting evidence of record, had increased for the future the divisions of revenue required to be given by all Southern carriers to all of the railroads operating in the eastern states. Citing Sections 557 and 706 of the Administrative Procedure Act, this Court showed its fear that, without restraints, "[t]he requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise."¹²³ The

¹²¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

¹²² *Baltimore & O. R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87 (1968).

¹²³ *Id.*, pp. 91-92.

Court's unanimous decision agreed with the lower court order setting aside the Commission's unsupported finding.

Assuming that spurs now are being applied to the ICC to assist the financial position of certain eastern railroads by increasing their divisions, what is to prevent the Commission from acting just as it did in this incentive per diem proceeding? For, divisions are the subject of Section 15(6) of the Interstate Commerce Act, and, like Section 1(14)(a), the Commission there is admonished, after hearing, to consider certain factors before prescribing just and reasonable amounts. Unlike Section 1(14)(a), Section 15(6) does not even contain the safeguard that action may be taken only "on the basis of such consideration" of specified facts. If the Commission's position is upheld here, there is nothing to prevent circumvention of this Court's 1968 *Official-Southern Divisions* determination, and the Commission's so-called expertise would be given free rein.

Recalling our earlier notation that a search of the Interstate Commerce Act disclosed 72 sections and subsections treating with hearings, none of which requires the making of a decision on the record, this Appellee suggests that, if the Commission should prevail here, many important ICC proceedings, particularly rate and revenue proceedings, would lose the protection of 556 and 557 of the Administrative Procedure Act.

We do not think that the Court has intended that the Commission's powers be so extended. While rulemaking of the type covered by the first sentence of Section 1(14)(a) is "an exercise of legislative rulemaking," as this Court only recently decided in *Allegheny-Ludlum Steel*,¹²⁴ the fixing of rates for cars, after hearing and the consideration of specific

¹²⁴ *United States v. Allegheny-Ludlum Steel*, U.S. , 32 L Ed 2d 453, 465 (1972).

factors, "has a quality resembling that of a judicial proceeding."¹²⁵ The control by a regulatory body of general operating practices, which bears only indirectly on income and outgo, can proceed more freely than the regulation of rates and compensation; the latter having more aspects of a judicial proceeding than the former.¹²⁶ So, where a hearing is required, and standards must be considered in fixing reasonable payments, such a case "is frequently described as a proceeding of a quasi judicial character."¹²⁷

While the operations of this country's railroads may be dedicated to a public use, the carriers still remain the private property of their owners, and carrier assets may not be taken from one railroad and given to another without the safeguards of due process.¹²⁸ It is essential to due process that, in a proceeding such as this, there be a fair hearing and that the conclusions reached be supported by evidential facts which can be examined on judicial review.¹²⁹ If the Interstate Commerce Commission is to be given the broad power which it seeks here, then arbitrary action, in the guise of administrative expertise, will be available to replace the safeguards to property rights now protecting this railroad and other carriers.

E. Restitution Is Not Appropriate Here.

Abandoning its earlier and unsupportable argument that the order of the court below would disrupt the Commission's incentive experiment, the government urges this Court to

¹²⁵ *Morgan v. United States*, 298 U.S. 468, 480 (1935).

¹²⁶ See 52 Harv. L. Rev. 259, 268-269 (1938).

¹²⁷ *Morgan v. United States*, 298 U.S. 468, 480 (1935).

¹²⁸ *Great Northern R. Co. v. Minnesota ex rel R. & W. Co.*, 238 U.S. 340, 345 (1915); *Interstate Com. Com. v. Oregon-Wash. R. & Nav. Co.*, 288 U.S. 14, 41 (1933).

¹²⁹ *Ohio Bell Teleph. Co. v. Public Utilities Com.*, 301 U.S. 292, 300-304 (1937).

require "restitution" of the incentive charges which Appellees would have paid had it not been for the disputed lower court order.¹³⁰ This is another of the questions not touched upon by the court below.

It is the government's position that there has been a "wrong" on the part of Appellees, that they have been unjustly enriched at the expense of unnamed parties, and, therefore, that the equitable doctrine of "restitution" should come into play. For support, it cites *Arkadelphia*,¹³¹ a proceeding in which shippers, who had been overcharged, sought to regain monies improperly collected by the carriers.

At page 145 of *Arkadelphia*, this Court confirmed the principle, upon which restitution is based, that "a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." Here, nothing was lost. The order of the court below forbade Appellees to collect incentive per diem monies; none was collected. And, contrary to the government's allegation at page 28 of its brief, this Appellee certainly did not get to "use disproportionately large numbers of general service boxcars belonging to other railroads"; that, in fact, is one of our complaints in this proceeding, since we don't need them.

Mr. Justice Cardozo, speaking for this Court in *Atlantic Coast Line*,¹³² would not follow *Arkadelphia* blindly, even in a situation in which the involved carrier obtained monies in reliance upon a basis later found improper. How much more equitable is Appellees' position, when not only did

¹³⁰ Appellants' brief, pp. 28-30.

¹³¹ *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134 (1919).

¹³² *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 309-310 (1934).

they not receive incentive monies, but the Commission's experiment with incentive per diem was not disturbed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A**Statutes Involved**

Section 1(14)(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 1(14)(a), provides:

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements or compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers

such incentive element or elements if the Commission finds it to be in the national interest.

Section 553(c) of the Administrative Procedure Act, 5 U.S.C. 553(c), provides:

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides:

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 706 of the Administrative Procedure Act, 5 U.S.C. 706, provides:

SEC. 706. SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 70-279

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY

On Appeal from the United States District Court for the
Middle District of Florida

BRIEF FOR THE FLORIDA EAST COAST
RAILWAY COMPANY

QUESTIONS PRESENTED

This case involves an order of the Interstate Commerce Commission requiring railroads, including the Florida East Coast Railway Company (FEC), to pay "incentive" compensation in addition to the payment of normal per diem rental for the use of unequipped boxcars during the period September through February of each year. The order was made under section 1(14)(a) of the Interstate Commerce Act, which authorizes the Commission to fix the compensation to be

paid by railroads for the use of freight cars only "after hearing." The case as it comes to this Court presents these questions:

1. Are the Commission proceedings under review governed by the provisions of 5 U.S.C. §§556 and 557.¹

2. Did the Commission's denial of FEC's request for oral hearing and oral argument prejudice FEC within the meaning of 5 U.S.C. §556(d) or otherwise deprive FEC of the hearing required by 49 U.S.C. §1(14)(a).

STATUTES INVOLVED

Pertinent portions of sections 1(14)(a) and 1(15) of the Interstate Commerce Act, 49 U.S.C. §§1(14)(a) and 1(15), and sections 553 and 556 of the Administrative Procedure Act, 5 U.S.C. §§553 and 556, are set forth in the Appendix.

STATEMENT

I. Commission Proceedings

The Commission order prescribing incentive per diem charges is the product of a second rule-making proceeding.² The Commission's order initiating the proceeding recited that the Commission was acting

¹ By letter dated June 17, 1972 from the Clerk of this Court, counsel for the parties were requested to brief this question.

² The first incentive compensation proceeding was initiated in June 1966. Written statements and studies were submitted in that proceeding by a number of railroads and by staff members of various bureaus of the Commission. Oral hearings were held before a hearing examiner of the Commission for presentation of additional evidence and for cross-examination of those who prepared and presented written statements and studies, including the members of the Commission's bureaus. The Commission heard oral argument. In its report in that proceeding (332 I.C.C. 11), the Commission considered at length the evidence and findings essential

"under authority of Part I of the Interstate Commerce Act (49 U.S.C. § 1, *et seq.*) ; more particularly, section 1(14)(a) and the Administrative Procedure Act (5 U.S.C. §§553, 556, and 557)" (App. 52). It made all railroads parties to the proceeding and directed the Commission's Bureau of Enforcement to participate (App. 52). All Class I railroads and certain Class II railroads were ordered to complete and file periodically data sheets showing, for selected stations and dates, the numbers and types of freight cars ordered by shippers and supplied by the carriers. The order also assigned the proceeding for hearing in Washington, D.C., provided for pre-hearing conference before a hearing examiner, and limited requests for leave to intervene by shippers and others to those made orally at the time of hearing (App. 52-53).

No such hearings were held. Instead, on December 22, 1969, the Commission served an interim report (J.S. App. 51a-84a) ³ proposing the imposition of incentive

to an exercise of its statutory authority under amended section 1(14)(a) to impose incentive compensation charges for any type of freight car. The Commission concluded that the evidence of record in that proceeding lacked reliable factual data which would enable the Commission to comply with the statutory requirements of section 1(14)(a) and make a valid decision as to the imposition of an interim incentive charge. The proceeding was discontinued by order of the Commission dated October 3, 1967. References to this decision are to the printed report of the Commission at 332 I.C.C. 11, *et seq.*

³ The interim report was preceded by the release on May 13, 1969 to a Subcommittee of the Senate Commerce Committee of a "Report of the Results of Freight Car Study in Ex Parte No. 252 (Sub 1)," together with tables compiled from the data for 1968 furnished by the railroads to the Commission in response to the order of December 26, 1967. *Hearing Before Subcommittee on Surface Transportation of Senate Committee on Commerce*, 91st Cong., 1st Sess., Ser. No. 91-8 (1969).

compensation charges to be applied to unequipped boxcars during the six-month period September through February of each year. The Commission expressed the hope that such an incentive charge might alleviate shortages over a period of years. The Commission emphasized, however, that the proposed incentive compensation was tentative and experimental (J.S. App. 55a), conceding that it was not known whether such charges would produce the desired results (J.S. App. 61a).

The order accompanying the interim report provided that verified statements of facts, briefs, and statements of position with respect to conclusions reached in the interim report might be filed by any interested person. The order further provided that any party requesting oral hearing should set forth with specificity the need therefor and the evidence to be adduced (J.S. App. 81a).

Verified statements, a brief, and a request for oral hearing and oral argument were filed by FEC. The verified statements establish that FEC is required to make substantially greater car hire payments to other carriers than it receives because of its location along the east coast of Florida and the commodities shipped by railroad to and from the Florida peninsula: FEC terminates substantially more carloads of interline freight than it is able to originate, and this imbalance is particularly evident with respect to commodities moving in unequipped boxcars; three of every four unequipped boxcars moved by FEC are returned empty to connecting lines (App. 116-17, 131-32, 135). FEC can not, under existing car service rules and traffic flow, use additional unequipped boxcars or force other railroads to accept empty FEC-owned unequipped boxcars. FEC moves boxcars efficiently and with dispatch

and imposition of additional car hire costs in the form of incentive compensation charges would not improve car utilization or efficiency on the lines of FEC (App. 120-23, 125, 149). The additional car hire cost imposed on FEC by the incentive compensation charge exceeds the net railway income earned by FEC in 1967 and 1968 (App. 115, 119-20).

FEC's request for oral hearing and oral argument stated that FEC desired to subpoena Commission employees who had testified in prior proceedings and specified the evidence expected to be produced.

On April 28, 1970, one month after replies were due to be filed and without further proceedings,⁴ the Com-

⁴ Between the date of the interim report and the release of the final report, the Chairman of the Senate Commerce Committee demanded immediate action in this proceeding, particularly with respect to boxcars for the movement of grain and lumber. At a Senate hearing held March 24, 1970 on freight car shortages, Senator Magnuson of Washington, Chairman of the Senate Commerce Committee, was sharply critical of the Commission and told Commissioner Stafford, Chairman of the Interstate Commerce Commission, that he expected action in this proceeding during April 1970:

THE CHAIRMAN. . . . I do want to ask the Commission, we did pass a bill three and a half years ago, now, have you implemented that act at all?

MR. STAFFORD. Senator, we spoke of this in our testimony this morning, but the original report is in on it. We expect to have it finally implemented before the heavy season hits us this year. We are now asking for replies.

THE CHAIRMAN. How long does it take to get a report on a bill that passed three and a half years ago? I do not know, maybe that bill is enough if you implemented that

MR. STAFFORD. The majority of the Commission felt that hearings were required and further consideration.

THE CHAIRMAN. I understand that, but three and a half years is a sufficient time. You know you fellows may not have

mission issued a final report affirming, with only minor changes, the findings and conclusions expressed in the interim report. In this final report, the Commission stated without further explanation that "No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and replies thereto received by this agency accord the parties a hearing under section 556 of that [Administrative Procedure] act" (J.S. App. 87a).

II. Decision of the District Court

FEC brought this action in the court below to set aside and enjoin the Commission's order. The three-judge district court permanently enjoined application and enforcement of the Commission's order as to FEC and Seaboard Coast Line Railroad Company,⁵ without prejudice to further proceedings before, and further

three and a half years left down there. I want to get you out in a blaze of glory.

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THE CHAIRMAN. . . . Of course, the act we passed was an incentive per diem rate, and I do not know whether that is going to work or not.

We always seem to run into the answer that we are having a study, and then there is a delay, and pretty soon it is upon us.

MR. STAFFORD. We are through with the study on it now. We are in the process of finalization on that.

THE CHAIRMAN. We have got to have something moving within the next month on this thing to take care of the harvest that is coming up in July—June in some places.

Hearings Before Special Freight Car Shortage Subcommittee of Senate Committee on Commerce, 91st Cong., 2d Sess., Ser. No. 91-68, pp. 54-55 (1970).

⁵ FEC and Seaboard Coast Line Railroad filed separate actions in the District Court for the Middle District of Florida to review and enjoin the Commission's order. The actions were consolidated for hearing and were disposed of in a single opinion and order by the district court.

findings and orders by, the Commission not inconsistent with the opinion of the district court (J.S. App. 16a). The court held that, since the Commission was authorized by section 1(14)(a) of the Interstate Commerce Act to act only after hearing, the Commission could not under section 556(d) of the Administrative Procedure Act refuse a hearing and deny cross-examination if a party was prejudiced thereby.

Its decision on this issue was in agreement with that of another three-judge district court in *Long Island R.R. v. United States*, 318 F.Supp. 490 (E.D. N.Y. 1970), involving the same Commission order (J.S. App. 7a). The court below noted that in *Long Island* the plaintiff had been found not to have been prejudiced because the plaintiff's request to the Commission for hearing was silent as to any respect in which disclosure of greater detail or cross-examination of the Commission's staff was needed to enable the plaintiff to mount a more effective argument against the proposal; that a different case would have been presented if the plaintiff in *Long Island* had pointed to specifics on which it need to cross-examine or present live rebuttal testimony (J.S. App. 7a).

The court below held that the facts of the instant case "demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission." With respect to FEC, the court pointed out that "FEC sought to disclose a number of deficiencies in the Commission's order by presentation of evidence and cross-examination of the employees of the Commission who directed and prepared the studies relied upon in reaching the Commission conclusions" (J.S. App. 8a). The court, referring to the requests of FEC and Seaboard to the Commission for hearing, concluded "Without

discussing in detail the grounds there urged as requiring hearing, we are of the clear view that these assertions demonstrate the prejudice to Seaboard and FEC arising from the Commission's failure to provide hearings" (J.S. App. 8a).

This disposition of the case made it unnecessary for the district court to decide other grounds upon which FEC challenged the lawfulness and validity of the Commission's order, and the district court expressly reserved decision on these points (J.S. App. 5a).

SUMMARY OF ARGUMENT

1. Fixing compensation for the use of freight cars under section 1(14)(a) of the Interstate Commerce Act is quasi-judicial action by the Commission. This conclusion is compelled by the nature of the power exercised by the Commission and the character of the Commission's order, the impact of the Commission's action on the carriers, and the language of section 1(14)(a), as amended, in explicitly requiring Commission findings and consideration of carefully enumerated factors as a prerequisite to Commission action. This conclusion is supported by the legislative history of section 1(14)(a), the consistent past practice and interpretation of section 1(14)(a) by the Commission in freight car compensation proceedings, and the decisions of this Court and other courts respecting the scope and nature of the hearing to which parties are entitled under similar circumstances. This Court's decision in *United States v. Allegheny-Ludlum Steel Corp.*, U.S. , 40 U.S.L.W. 4664 (U.S. June 7, 1972), concerning application of sections 556 and 557 of the Administrative Procedure Act to a Commission proceeding prescribing car service rules, is not dispositive of this case. *Allegheny-Ludlum* involved

an instance of legislative rule making and not, as here, quasi-judicial agency action.

2. The Commission's denial of FEC's request for oral hearing prejudiced FEC because it denied FEC an opportunity to develop a record to persuade the Commission not to impose incentive charges and a full record for judicial review of an adverse result. The denial was unexplained in the report of the Commission. The subject matter of the testimony FEC proposed to compel from the Commission employees at the hearing is similar to that elicited from Commission employees in freight car compensation hearings during the past 25 years. The evidence FEC proposed to present was relevant to the findings and conclusions section 1(14)(a) requires as a prerequisite to Commission action. The four points FEC expected to establish by the testimony contradicted the basic factual findings the Commission made in this proceeding to justify imposition of incentive per diem.

3. The "restitution" question raised for the first time in the Government's brief is not now before this Court. Assuming reversal, it is premature to consider a final judicial disposition of this action without resolving other substantial issues raised but specifically not decided by the court below. Moreover, the scope of judicial review of the Commission order by the lower court will be determined by the decision of this Court on whether the Commission proceeding is governed by sections 556 and 557 of the Administrative Procedure Act.

ARGUMENT**I. Sections 556 and 557 of the Administrative Procedure Act Govern Commission Proceedings Fixing the Compensation To Be Paid for the Use of Freight Cars**

Section 1(14)(a) of the Interstate Commerce Act authorizes the Commission, after hearing, to fix the compensation to be paid for the use of any type of freight car. As amended in 1966, section 1(14)(a) provides that in fixing such compensation the Commission "...shall give consideration to the national level of ownership of such type of car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such element or elements as in the Commission's judgment will [1] provide just and reasonable compensation to freight car owners, [2] contribute to sound car service practices (including efficient utilization and distribution of cars), and [3] encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." Section 1(14)(a), as amended, further provides that the Commission shall not make any incentive element applicable to any type of freight car "the supply of which the Commission finds to be adequate" and that the Commission may exempt any group of carriers from payment of such incentive element or elements "if the Commission finds it to be in the national interest."

The exercise by the Commission of this power to fix compensation for the use of freight cars requires a determination on the record after opportunity for

agency hearing within the meaning of 5 U.S.C. §553 (c), and the provisions of 5 U.S.C. §§ 556 and 557, therefore, govern the proceedings.

1. Section 1(14) (a) confers power to fix the compensation railroads must pay for the use of freight cars owned by others and necessarily the compensation each railroad will receive for the use of its cars by other lines. It includes the power to fix the compensation predicated solely upon costs of ownership and the power to increase the compensation by incentive elements specified in section 1(14) (a) for types of cars the supply of which the Commission finds to be inadequate. *Union Pacific R.R. v. United States*, 300 F.Supp. 318 (D.Neb. 1969), *aff'd per curiam*, 396 U.S. 27. The owner, required to release possession of a car to another carrier to further the through movement of freight, may not be deprived of its use without compensation. On the other hand, the carrier using the car is required by sections 1(4), (10), and (11) to accept possession for the purpose of continuing the transportation, and may not be compelled under normal circumstances to pay more than the cost it would have incurred as the owner of the car or by use of its own car. Only under the standards and to the extent specified in section 1(14) (a) may the Commission increase this basic compensation by incentive elements. *Union Pacific R.R.*, *supra* at 323, 326.

At issue is the essential quality of the Commission proceeding under review and the nature of the hearing the statute prescribes. The Commission, as the agent of Congress, must act in accordance with the standards and under the limitations of section 1(14) (a) in prescribing compensation for use of freight cars, including incentive elements. Section 1(14) (a) requires the Commission to determine, as a condition to its action, that

the supply of a type of car is inadequate and the extent to which compensation should be increased "to provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." The discharge of this duty involves the determination of disputed factual issues and the application of the statutory criteria to them. *Incentive Per Diem Charges*, 332 I.C.C. 11, 14-17 (1967), discusses at length the critical factual issues to be resolved in fixing incentive compensation under section 1(14)(a).⁶ *Boston & Maine R. R. v. United States*, 162

⁶ The Commission held *inter alia*:

Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. 332 I.C.C. at 14.

Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. 332 I.C.C. at 15.

... Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. 332 I.C.C. at 16-17.

... At best, these figures [reports of shortages] indicate only that an unsatisfied demand exists in varying degree. Their

F.Supp. 289 (D. Mass. 1958), *appeal dismissed*, 358 U.S. 68, demonstrates the scope and extent of contested factual issues in fixing just and reasonable compensation for use of freight cars. The Commission must act in a quasi-judicial capacity in resolving disputed issues of fact. Compare, K. Davis, *Administrative Law Treatise*, § 5.01, p. 285, § 7.03, pp. 416-17, § 7.04, p. 422 (1958); Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51, 76-70; Robinson, *The Making of Administrative Policy: Another Look at Rule-Making and Adjudication and Administrative Procedure Reform*, 118 U.Pa.L.Rev. 485, 503-05, 520-23 (1970). Prescribing the compensation to be paid for the use of freight cars is legislative action in the same sense as prescription of future rates. *Prentiss v. Atlantic Coast Line R.R.*, 211 U.S. 210; *United States v. Morgan*, 313 U.S. 409, 417. This Court has consistently held that fixing future rates is a quasi-judicial function and subject to judicial review on the record made before the agency. *ICC v. Louisville & N. R.R.*, 227 U.S. 88, 91-93; *Morgan v. United States*, 298 U.S. 468. Section 1(14)(a) necessarily prescribes a hearing in authorizing the Commission to fix the compensation to be paid for the use freight cars. The pro-

probative value is not impressive and, even if they did provide a basis for a finding as to the true gap between current demand for cars by particular type and the extent to which that demand is being met, they also show concurrent surpluses of the same types. No information is presently available as to the extent to which these surplus cars could be used to meet the unsatisfied demand, or the true difference which might be treated as a guide to a present inadequacy in supply. In any event, we must, as heretofore noted, give serious consideration to many other factors affecting the adequacy of the national freight car supply, information which has not yet been developed in relation to the present problem, and with which we may not dispense. 332 I.C.C. at 17.

vision for hearing carries with it fundamental procedural requirements: "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action." *Chicago Junction Case (Baltimore & O. R.R. v. United States)*, 264 U.S. 258, 265.

2. The effect of any Commission order fixing compensation, including incentive elements, on the carriers is both direct and significant. The amount of incentive compensation paid by debtor lines amounts to millions of dollars each six-month period. The basis upon which the compensation is calculated vitally affects both the owning and using railroads and particularly those railroads, such as the FEC, that terminate more traffic than they originate. *Boston & Maine R.R. v. United States*, 162 F.Supp. at 294, 297-98. As the Commission noted in its prior decision in *Incentive Per Diem Charges*, 332 I.C.C. at 13, "Any alteration in the costs of transportation services, any diminution in their availability, produces repercussions throughout the entire structure." The verified statements of FEC in this proceeding establish that FEC paid in 1968 approximately 5-1/2 percent of its total railway operating revenues for car rental charges and that the additional cost of the prescribed incentive compensation on unequipped boxcars applied over a six-month period would have exceeded the net railway income of FEC in both 1967 and 1968 (App. 115).

Congress was well aware of the potential adverse effect of incentive compensation, particularly on terminating lines. The provision in section 1(14)(a) for

Commission action only after hearing was emphasized during debate on the 1966 amendment to section 1(14) (a) to allay the concern of members of the Congress about the consequences of imposing incentive compensation on these railroads. Mr. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce and floor manager of the bill, assured those members who questioned the effect of the measure on terminating lines that "full hearings" would be held by the Commission before incentive charges were put into effect. Mr. Staggers said:

MR. STAGGERS: I might say to the gentleman that this will not be put into practice until there have been full hearings before the Commission and all sides have had an opportunity to argue and present their facts on the question. I am certain that if there is discrimination, we will see it. The committee will keep watch over the situation. This will be done only after each side has had an opportunity.

* * * * *

MR. STAGGERS: . . . [T]he committee in its wisdom tried to do the very best it could under the circumstances after the railroads failed to do their job. . . . The chairmen corresponded with them for months in an effort to get them to do something or to come up with some kind of suggestion, which we really did not get. As I said, this will not be put into effect until after complete hearings have been held before the Commission showing the need, and certain groups can be exempted if, in the wisdom of the Commission, such exemptions are needed in the public interest.

112 Cong. Rec. 9953-54 (1966).

Similar assurances were voiced by the Chairman of the Senate Committee on Commerce during debate on the

proposal in the Senate (112 Cong. Rec. 10250-51). Commission representatives, in proposing section 1(14) (a) be amended to authorize the Commission to require railroads to pay incentive compensation for freight cars, repeatedly testified that great care would be taken in exercising the authority to require incentive compensation and that hearings would be held to determine the facts essential to a decision under the statutory criteria.⁷

⁷ For instance, the then Chairman of the Commission, testifying before the House Committee on Interstate and Foreign Commerce on the bill subsequently enacted by Congress amending section 1(14) (a) to include incentive elements of compensation, said:

In addition, I would like to point out that no sudden change in per diem charges would be effected by the proposed legislation. Section 1(14) of the act, as proposed to be amended, provides for hearings. The Commission's decision, after hearings, would be subject to judicial review.

Hearings would be necessary in any event to determine, among other things, deficiencies by type of cars and by carriers, and the most equitable means of correcting these deficiencies.

A comprehensive study of traffic requirements, including peak loadings, would be necessary. Separate studies would be required for particular types of equipment, such as box, gondola, flat, hopper, refrigerator, and other special types of cars.

In addition, it would be necessary to consider the type and flow of traffic and the extent to which particular carriers are originating, terminating, or bridge lines.

In fixing the compensation to be paid for the use of freight cars, the Commission would have to determine what basis of compensation would provide a fair return on investment to freight car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

It would be necessary for us to determine whether the compensation should be computed on the basis of elements of ownership costs involved in owning and maintaining freight cars including a fair return on investment, whether compensation should include an element reflecting the value of use of

3. The Commission has consistently held that its proceedings under section 1(14)(a) to fix compensation for the use of freight cars, including incentive compensation, must comply with sections 556 and 557 of the Administrative Procedure Act. In *Incentive Per Diem Charges*, 332 I.C.C. at 14, the Commission held: "Section 1(14)(a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. § 551 et seq." The Commission has always held oral hearings in proceedings to fix compensation for the use of freight cars, both before and after enactment of the 1966 amendment to section 1(14)(a). *Incentive Per Diem Charges*, *supra*; *Chicago B. & Q. R.R. v. New York, S. & W. R.R.*, 332 I.C.C. 176, 190 (1968); *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, 664 (1947); *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 373 (1930); and see *Compensation for Transportation Service*, 332 I.C.C. 554, 555, 562 (1968), *sustained*, *Southern Ry. v. United States*, 306 F.Supp. 108 (E.D. Va. 1969). This present case is unlike that in *Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968), where the consistent agency practice had been to provide formal hearings in licensing cases and informal hearings in general rule making proceedings confined to written submissions and non-record interviews. 400 F.2d at 785. The Commission's consistent interpretation and application

freight cars, or whether it should be fixed upon some other basis or combination of bases.

It would also be necessary to determine whether to prescribe incentive per diem rates industrywide, or to prescribe separate incentive rates for individual carriers by type of car.

Hearings Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., Ser. No. 89-26, at pp. 45-46 (1965). See also, *Hearings Before Freight Car Shortage Subcommittee of Senate Committee on Commerce*, 89th Cong., 1st Sess., Ser. No. 89-23, at pp. 14-15 (1965).

of section 1(14)(a) is entitled to weight in determining whether the proceeding is one governed by section 556 and 557 of the Administrative Procedure Act, and particularly so, in light of the legislative history of the 1966 amendment to section 1(14)(a) outlined above. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549-550; *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 313-315.

The Commission, in fact, relied on the provisions of sections 556 and 557 of the Administrative Procedure Act in initiating and in deciding this proceeding. The initiating order specifically referred to sections 556 and 557 of the Administrative Procedure Act. Even in the final decision, after abandonment of the procedural plan to assign the proceeding for hearing, the Commission asserted that the procedure employed accorded the parties a hearing under section 556 of the Administrative Procedure Act (J.S. App. 87a).

4. The structure of the Interstate Commerce Act dealing with compensation to be paid by one railroad to another for the use of cars supports the view that Commission action must be predicated on findings made on evidence of record after opportunity for agency hearing. Section 1(14)(a), in terms, provides that the Commission may act only "after hearing." Section 1(15) authorizes the Commission in emergency situations, without notice, hearing or other formal procedure, to make just and reasonable directions with respect to car service, including the use of freight cars, as, in the opinion of the Commission, will best meet the emergency and serve the public interest. Section 1(15), however, expressly provides that the terms of compensation for use of cars during the emergency may be fixed as the Commission "after subsequent hearing

finds to be just and reasonable." This provision, as the former General Counsel of the Commission explained in 1969 to the Senate Subcommittee on Surface Transportation in testimony quoted by the court below (J.S. App. 11a, 14a-15a), makes clear that the determination of the compensation to be paid for the use of equipment, even in emergency situations, requires a hearing. The Commission has held that action under this section requires a determination on the record after opportunity for hearing under the Administrative Procedure Act. *Compensation for Transportation Service, supra* at 555.

Section 1(15) delegates to the Commission separate and virtually unlimited power, unhampered by procedural delays and other predicates of section 1(14)(a) action, to take immediate steps to relieve shortages of equipment, congestion of traffic, and other emergency conditions arising in any part of the country. There is, therefore, no real foundation for a claim (Brief for Appellants at 21-22) that the Commission must be permitted to dispense with the required hearing in order to avoid cumbersome procedural delays or to satisfy some Congressional critics of the Commission.

5. Both the court below and the district court in *Long Island, supra*, held that sections 556 and 557 of the Administrative Procedure Act govern this proceeding. In *Long Island*, the court considered at length the question whether a Commission decision fixing the compensation to be paid for the use of freight cars under authority of section 1(14)(a) was, within the terms of section 553(c) of the Administrative Procedure Act, "required by the statute to be made *on the record* after opportunity for agency hearing." 318 F.Supp. at 495-97; J.S. App. 128a-133a. That court, after reviewing the

purpose of section 553(c) of the Administrative Procedure Act and the interpretation and background of section 1(14)(a) of the Interstate Commerce Act, as amended, concluded that Commission action under section 1(14)(a) was of a character that required Commission determination to be made on the record after opportunity for agency hearing (J.S. App. 128a-133a). The Government on brief urges that this decision is wrong. The Government argues that the phrase "on the record" or some additional word in the statute itself such as "full" modifying the word "hearing" is necessary to bring Commission rule making proceedings under the Interstate Commerce Act within the scope of sections 556 and 557 of the Administrative Procedure Act (Brief for Appellants at 18-19). The distinction now pressed by the Government has never been made by this Court, and it is inconsistent with the prior decisions of this Court construing the Interstate Commerce Act. As early as 1924, Mr. Justice Brandeis rejected the claim that the Commission was free to act in its discretion and without evidence of record when the Act used the phrase "after hearing." *Chicago Junction Case*, *supra* at 265. In that opinion, Mr. Justice Brandeis pointed out that the phrase "after hearing" in the Interstate Commerce Act had uniformly been held to subject Commission orders to judicial review and, where an essential finding was unsupported by evidence, the order had been declared void. 264 U.S. at 265 n. 9. No distinction was made between orders entered under sections of the Act using the phrase "after hearing" and those containing the phrase "full hearing."⁸

⁸ The sections of the Interstate Commerce Act referred to in the *Chicago Junction Case* opinion are: (1) § 15(1) unreasonable rates—"full hearing"; (2) § 15(1) discriminatory rates—"full hearing"; (3) § 1(9) switching connections—"full hearing"; (4)

Mr. Justice Brandeis found support for this result in the distinction made by section 1(15) between the power to issue car service orders under emergency conditions without hearing and the power to fix terms of compensation after "subsequent hearings." 264 U.S. at 265 n. 10.

Differentiating the procedures to be employed by the Commission on the basis of whether the particular section of the Act contains the phrase "after hearing" or the words "full hearing" would produce totally irrational results. For instance, it would mean that railroad rate making proceedings under sections 15(1) and (7) of the Interstate Commerce Act would fall within the requirement for determination on the record after opportunity for hearing, but that no such requirement would apply to proceedings involving motor carrier rate making under sections 216(e) and (g), water carrier rate making under sections 307(b) and (g), and freight forwarder rate making under section 406(e).

6. This Court's decision in *United States v. Allegheny-Ludlum Steel, supra*, is not dispositive of the question whether this proceeding is governed by sections 556 and 557 of the Administrative Procedure Act. In *Allegheny-Ludlum*, this Court held an order of the Commission, requiring all railroads to comply with car service rules 1 and 2, to be legislative rule making. 40 U.S.L.W. at 4669. This being so, the Court held that the Commission was not required, either by section 1(14)(a) of the Interstate Commerce Act or the Ad-

§ 15(6) division of joint rates—"full hearing"; (5) § 5(1) pooling—"after hearing"; (6) § 5(10) railroad control of water carriers—"full hearing"; (7) § 19a(i) valuation of railroad property—"after hearing"; and (8) § 5(2) merger and control of railroads—"after hearing."

ministrative Procedure Act, to make its determination in that proceeding "on the record" after opportunity for agency hearing. 40 U.S.L.W. at 4669.

There is a substantial distinction in the character and nature of the Commission action in *Allegheny-Ludlum* and the proceeding here under review. *Allegheny-Ludlum* dealt with car service rules for the handling, movement, and return of freight cars. In that proceeding, the Commission ordered future mandatory compliance with car service rules the carriers had previously adopted voluntarily but with which some carriers and shippers had not complied. The Esch Car Service Rules Act—now incorporated in section 1(14)(a)—authorizes the Commission after hearing to "establish reasonable rules, regulations and practices with respect to car service...."

The proceeding here under review is of a different nature and the order of the Commission of a different character. This proceeding involves the fixing of compensation for use of freight cars by non-owning railroads under standards specified by Congress. Fixing the compensation to be paid one railroad for the use of freight cars by another railroad necessarily presents issues requiring the exercise by the Commission of a quasi-judicial function. *Palmer v. United States*, 75 F.Supp. 63 (D.D.C. 1947); *Union Pacific, supra*; *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948). Section 1(14)(a) requires performance of such a function by establishing statutory criteria and findings as a prerequisite to Commission action in fixing compensation. The nature of the proceeding and character of the order here under review in respect to procedural requirements are indistinguishable from Commission action in fixing freight rates

(*ICC v. Louisville & N. R.R.*, *supra*) or divisions of joint revenue among carriers (*Baltimore & O. R.R. v. Aberdeen & R. R.R.*, 393 U.S. 87). The Attorney General's Manual correctly states the application of the Administrative Procedure Act to this Commission proceeding as follows:

Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. . . . *Attorney General's Manual on the Administrative Procedure Act* at p. 33 (1947).

The questions presented by this case concern FEC's right to cross-examination and production of testimony relevant and material to the issues required to be decided under the criteria specified in section 1(14)(a). The question is whether FEC was accorded the "hearing" provided by the terms of section 1(14)(a). In this aspect, the present case is unlike *Allegheny-Ludlum*, *supra*. In *Allegheny-Ludlum*, the Commission had afforded all parties an opportunity to present evidence in written form and had held an elaborate oral hearing for cross-examination and presentation of testimony. 40 U.S.L.W. at 4665. Appellee's claim of procedural error in *Allegheny-Ludlum* was that the Commission had not confined its consideration to matters of record, but had relied on materials outside the record to support its

conclusion to make observance of car service rules mandatory (Brief for Appellee, Association of American Railroads, at 35, *et seq.*). Here, the questions relate to the right of a railroad, required to accept box-cars owned by others and pay incentive compensation for their use, to challenge the factual basis relied upon to impose incentive compensation, through cross-examination and presentation of expert testimony contradicting the factual conclusions expressed in the Commission's interim order.

We conclude that the Commission proceeding is governed by sections 556 and 557 of the Administrative Procedure Act. We next consider whether the Commission's denial of FEC's request for hearing and oral argument prejudiced FEC.

II. The Commission's Denial of FEC's Request for Hearing and Oral Argument Prejudiced FEC

FEC, in compliance with the Commission's order accompanying the interim report, requested oral hearing and oral argument (J.S. App. 44a-48a). The denial of that request prejudiced FEC.

1. FEC requested hearing to compel testimony from the employees of the Commission who supervised and directed the study upon which the Commission relied in reaching its conclusions respecting the adequacy of car supply and testimony of Commission employees experienced in matters affecting national freight car supply.⁹

⁹ FEC's request for hearing stated, in part:

FEC expects at an oral hearing to compel the attendance of those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in

FEC's request to the Commission for hearing, unlike that made by the Long Island,¹⁰ specified four specific, factual matters expected to be established by such evidence. The four points contradicted basic findings made in the Commission's interim report to justify imposition of incentive compensation.

The Government argued in its jurisdictional statement (J.S. 16) and repeated on brief (Brief for Appellants at 26) that the questions FEC sought to have answered through cross-examination of Commission staff were so worded that the Commission "would readily have agreed with" each fact without changing any of its conclusions. This argument is, as the court below correctly held, "wide of the mark." Neither Government counsel nor a reviewing court can know what facts

Ex Parte No. 252.¹⁹ FEC expects to establish, by cross-examination of such persons, the following facts, among others:

- a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region.
- b. Railroad ownership of additional plain box cars would not necessarily change the results summarized in the appendices to the interim report.
- c. No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year.
- d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

¹⁹ A list of such persons will be supplied by FEC as required by Commission procedures in advance of the hearing. (J.S. App. 47a-48a).

¹⁰ The request of the Long Island for hearing upon which the district court decision in that case is predicated appears at pp. 101-05 of the Appendix.

the Commission "would" have agreed with or what conclusions it "would" have reached in the face of such testimony. On brief, Government also argues that it is FEC's burden to demonstrate that the proposed examination and testimony would have "materially" aided the Commission in resolving the issues before it (Brief for Appellants at 24). If the Government is suggesting that the proposed examination and evidence must be relevant to the issues before the Commission, we would agree. If, however, the Government is suggesting that FEC must demonstrate to a reviewing court that the examination and evidence would have compelled a different agency decision, we wholly disagree.

2. The Commission itself did not rest denial of FEC's request for hearing on the ground that the evidence proposed would not, if submitted, change the result or that the evidence would not have materially aided in deciding the issues before it. The Commission's report, in fact, gives no explanation whatever for denying the request for oral hearing. It says only that "No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that [Administrative Procedure] act" (J.S. App. 87a). This treatment invites *post hoc* rationalization by agency counsel justifying denial of hearing. We submit that, if hearing is to be denied because the evidence proposed to be submitted is immaterial or unpersuasive, the agency itself should express those reasons in its report.

FEC's burden in the reviewing court is not to establish that the evidence it proposed to produce at the oral hearing would have, if received, compelled the agency

to reach a different result. FEC is entitled to a fair opportunity to develop a record for persuading the Commission not to impose incentive charges and for judicial review of an adverse result. FEC met its burden by showing that the procedure precluded FEC from presenting relevant and material evidence in support of its position in opposition to incentive compensation charges. Or, as both the court below and the district court in *Long Island* held, prejudice is shown by demonstrating that the "disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission proposal" (J.S. App. 7a, 136a). We shall demonstrate in this section of the brief that the examination and evidence proposed by FEC was relevant to the proceeding.

3. A further preliminary issue requires comment before turning to a discussion of the relevancy of the examination and evidence FEC proposed to compel under subpoena. The Government now asserts that FEC can not, in any event, cross-examine Commission staff employees since to do so would probe the mental process of the Commission and disrupt the internal working of the agency and the integrity of the administrative process (Brief for Appellants at 25-26). This argument, advanced for the first time on brief in this Court, is best contradicted by the Commission's own past practices. FEC's request for hearing specified that Commission employees who had testified respecting freight car supply problems in prior proceedings would be subpoenaed. In both Ex Parte 252 and Ex Parte 241, Commission counsel presented Commission employees for cross-examination in support of the written statements and studies they had submitted for the record in those

proceedings. 332 I.C.C. at 12. Testimony from similar staff employees and agents was also submitted in support of increased per diem charges in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, 664 (1947). The employees proposed to be cross-examined are not Commissioners or confidential staff assistants of the individual Commissioners who participated in the decision-making process. They are field agents, data assemblers, and car supply directors employed by the Commission. They prepared the statistical study and the field audits to which the Commission referred as providing the factual basis for the conclusions expressed in the interim report (J.S. App. 62a-70a, 88a-91a). The testimony was to come from employees of the Commission whose experience and duties involved familiarity with the problems of movement and supply of freight cars on a national basis. FEC did not propose to probe the mental processes of the Commission; it proposed to illuminate the record by exposing the bases of the statistical studies and by presenting expert opinion contradicting the factual conclusions expressed in the interim report.

4. In the context of the proceeding and in the light of the findings expressed by the Commission, the testimony and cross-examination FEC sought was material and relevant to the agency determination under section 1(14)(a). The interim report of the Commission (J.S. App. 51a) proposing imposition of incentive per diem charges depended upon a conclusion that a nationwide shortage of unequipped boxcars exists during the six-month period September through February of every year. A study attached to the interim report prepared by the staff of the Commission was the basis for this conclusion. The study was based upon periodic reports

filed during 1968 by individual railroads on data sheets designed by the Commission's staff. The individual reports listed by station for selected dates the number of cars requested by shippers to be placed for loading, the number actually placed, and the number of empties at that station and at other stations on the reporting railroad. The study summarized the data by six geographic zones. The study claimed both a failure to fill shipper orders for plain boxcars (a deficiency) and, at the same time, a large surplus of empty plain boxcars within the same geographic zones (J.S. App. 68a). The Commission asserted that improved efficiencies in use, movement, and return of boxcars would not, in its judgment, eliminate reported deficiencies during the winter months (J.S. App. 69a-70a). The Commission concluded that shortages "probably" could be relieved only by an increase in the total number of plain boxcars (J.S. App. 70a). The Commission concluded that the imposition of incentive per diem charges "should tend" to speed up the use, movement, and return of foreign cars, produce a flow of funds for creditor roads to purchase needed equipment, and "might tend" to encourage acquisition of additional boxcars by carriers in every part of the country (J.S. App. 54a). The final report of the Commission adopted these findings and conclusions of the interim report (J.S. App. 88a).

The testimony FEC sought to compel would have tested the validity of the study upon which the Commission relied and established facts contradicting the Commission's assumptions relating to car supply.¹¹

¹¹ The Chairman of the Commission testified that the validity of the conclusions expressed in the staff study presented to the Senate Subcommittee in May 1969 "... must be tested against other evidence that will be received in the course of the hearings." *Hear-*

The testimony could not have been presented by FEC as a part of its written presentation because the information was in the possession and knowledge of the Commission's employees proposed to be subpoenaed.

a. FEC proposed to demonstrate through the Commission staff that the "deficiencies" in furnishing boxcars, reported by the individual railroads and tabulated in the study upon which the Commission relied to make the essential finding of inadequate car supply, may not be affected by the number of boxcars owned by the railroad or by any regional group of railroads. The reports completed by the railroads required each railroad to show as a "deficiency" the failure to supply a car on the day requested by the shipper no matter when the request was received (J.S. App. 65a, 67a). For example, a request received at noon for a boxcar that same day would produce a reported deficiency unless the car was supplied that day (J.S. App. 66a-67a). Train schedules and switch engine crew assignments may, and frequently do, prevent placement of a car upon short notice even at locations served every day regardless of the availability of empty cars (App. 124-25). Many

ing Before Subcommittee on Surface Transportation of Senate Committee on Commerce, United States Senate, 91st Cong., 1st Sess., Ser. No. 91-8 (1969). The Commission had earlier expressed reservations about the sufficiency, relevancy, and materiality of the data collected under its order of December 26, 1967 initiating this proceeding. By order served January 24, 1969, the Commission revised the data sheets to be completed by all railroads because, according to the order, "as a result of the processing and a preliminary analysis, the data submitted by the carriers as referred to hereinabove [covering the year 1968], certain revisions and refinements appear desirable in order to insure that the record herein shall contain sufficient, relevant, and material facts and information upon which the Commission can base a determination of the issues involved" (App. 65). The data collected pursuant to this order has never been compiled and released by the Commission.

branch lines are served only once or twice a week, but a request for a boxcar on a day that no service was scheduled would also be recorded as a deficiency. FEC proposed to show, therefore, that the reported "deficiencies" tabulated in the study were the result of train service schedules rather than lack of cars and that reported deficiencies may not be affected by the supply of cars available at a station, on a railroad, or in a statistical region. The record as made before the Commission suggests that the number of reported deficiencies because of train schedules was quite substantial.¹² Although the Commission's Bureau of Enforcement conceded that orders for car placements on a day when no service was scheduled should not have been counted as orders for cars on that day,¹³ such "deficiencies" were not excluded from the reports or the study. In the absence of the requested cross-examination, there was no way to determine whether, or to what extent, the reported deficiencies were the result of inadequate car supply or service factors unrelated to car ownership. The importance of this showing, both in terms of the Commission proceeding and of judicial review of the Commission's decision, is emphasized by the Commission's reliance on any reported "deficiency" in placing cars as evidence that the railroads owned an inadequate number of plain boxcars (J.S. App. 89a).

b. FEC also proposed to present, on this issue, testimony of Commission car service experts to show that reports of "deficiencies" such as those used in the

¹² The record in the proceeding now shows, for example, that 25 to 30 percent of all stations on the Penn Central are served on less than a daily basis and that this fact affected the deficiencies reported by that railroad (App. 156-57).

¹³ Bureau Reply Brief, p. 7 (App. 190).

staff study are substantially affected by shipper practices of over ordering cars or placing duplicate orders with two or more railroads, particularly during the fall and winter grain harvest in the Midwest.¹⁴ FEC proposed further to cross-examine the service agents upon whom the Commission relied to conclude that the reports were free of any "duplication or inflation in the car orders reported" (J.S. App. 65a-66a). The accuracy of this conclusion is important because inflated, duplicative, or repetitious orders for cars drastically distort the number of reported shortages and deficiencies. The requested cross-examination would have disclosed whether the agents took into account the fact that shippers frequently "cancel" orders only after the day the cars are to be placed. Only cross-examination would have disclosed how, if at all, the Commission agents auditing carrier A could determine that shippers had not

¹⁴ Howard S. Kline, Chief of the Open Car Branch, Section of Car Service, Bureau of Railroad Safety and Service of the Commission, had stated under cross-examination in 1966:

Q. You have indicated that you know, then, of a practice of shippers to order more cars than they actually need, to request the carrier to place more cars than they actually need, under such circumstances.

A. Yes.

• • • • •

Q. Could you test it perhaps by a sampling procedure to deal with the shippers themselves, and compare their actual shipments over a period of time with their placing of orders for the placement of cars?

A. No, because I do not think there is too much connection between the car shortages as reported by shippers, and their shipments. Our men have turned in reports any number of times of elevator men with plugged elevators, that had a siding that would hold five cars, and still they are ordering 20 cars a day. What would they do with the other 15?

(Transcript of Hearings on
November 2-3, 1966 in Ex Parte
252, pp. 167, 275-276)

placed duplicating orders with carrier B. The presentation of testimony from Commission experts respecting such practices, as well as cross-examination of the auditors, was neither frivolous nor without reasonable foundation.¹⁵ In Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969), the parties unanimously agreed, and the Commission found, that the reported car shortages in that proceeding had to be reduced *at least 50 percent* to compensate for over ordering by shippers (335 I.C.C. at 305-306).

c. FEC requested hearing to prove, through Commission staff experts, that acquisition of additional plain boxcars would not necessarily alleviate reported national shortages and deficiencies. FEC presented the evidence in its possession that increases in the number of plain boxcars would only exacerbate the imbalance of empty plain boxcars on FEC's line, resulting in decreased efficiency in car utilization and increased incentive per diem obligations (App. 125). FEC proposed to show, through the testimony of Commission staff members with long experience in freight car service matters, the extent to which inefficient car utilization on a national basis would be a likely product of increased car supply. This evidence was directly relevant to the statutory duties of the Commission under section 1(14) (a) of the Act. Section 1(14) (a) authorizes imposition of incentive compensation only if the Commission finds

¹⁵ The study attached to the interim report makes contradictory claims as to the extent to which the data is affected by over ordering and duplicate orders. Based on the field audits, the study asserts that the reports were 91.7 percent free of duplication or inflation (J.S. App. 65a). Yet, the study also claims the figures are demonstrated to be 99.1 percent free of duplication (J.S. App. 66a). A seven percent error destroys the validity of underlying data for the purposes of this proceeding.

such charges, among other things, "will . . . contribute to sound car service practices (including efficient utilization and distribution of cars). . . ." The only basis the Commission, as proponent of the rule, offered in its report to satisfy its statutory burden of finding that more efficient car utilization and distribution would evolve was an expression of conditional, qualified hope that incentive charges "may," "should," "might" produce this desired result (J.S. App. 54a, 57a). But, in the end, the Commission had to concede that it did not know whether incentive per diem would work at all (J.S. App. 61a). The tack the Commission took in its final report concerning the effect of incentive per diem was simply to shift the evidentiary burden from the Commission as the proponent of incentive compensation to respondent railroads. The Commission held:

No evidence was produced by these parties beyond the opinions of certain railroad officials . . . that the proposed scale would be ineffective as an incentive. (J.S. App. 92a)

This conclusion by the Commission underscores the prejudice FEC sustained when the Commission refused an oral hearing at which FEC proposed to present the testimony of non-railroad witnesses on these critical issues.

d. FEC had reasonable grounds to believe that Commission staff members experienced in freight car supply problems would have testified that the statistics summarized in the interim report were insufficient to support a determination as to what constitutes an adequate car supply or how many additional general purpose boxcars were needed to remedy deficiencies found to exist. Mr. Howard S. Kline, the Commission's expert on freight car supply, had testified in another proceeding that a supply of cars adequate to furnish all shippers cars within 24 hours of their request would be so

large that rail traffic would come to a standstill from the resulting congestion (Transcript of Ex Parte 241 Hearings, pp. 1235-36). The Commission, in effect, reached the same conclusion in the 1967 decision in Ex Parte No. 252 (322 I.C.C. at 13). Yet, the standard applied by the Commission in this proceeding was even more stringent—the ability or failure of railroads to place cars for loading at the time requested even if the request for service was made on the same day (J.S. App. 89a).¹⁶ FEC had reason to believe that responsible staff members of the Commission would have testified that it is unreasonable to measure the adequacy of freight car supply, particularly in periods of heavy grain harvests, by the ability of railroads to furnish plain boxcars upon request regardless of how peremptory the request.¹⁷ Responsible officials of the Commis-

¹⁶ The preliminary staff analysis of the 1968 freight car study presented to the Senate Subcommittee on Surface Transportation, mentioned in the Commission report (J.S. App. 90a n. 4), contains a summary of some, though not all, of the underlying data. This summary indicates that there was a daily average of 18,666 orders for unequipped boxcars in 1968, 60 percent of which were for placement on the day the order was received by the carriers. *Hearing Before Senate Subcommittee, supra* at 40, 88, 96.

¹⁷ The study furnished to the Senate Subcommittee on Surface Transportation observed with reference to this point that:

Reliance on these statistics for a measure of the extent of any inadequacy of car supply, of course, involves an assumption that it is reasonable to require the railroads to fill every order on the day for which the cars are requested and that a shipper who requests prompter service, no matter how peremptory that request may be in relation to the demands of all shippers for the same type of car, is entitled to such service. This assumption may be unwarranted, and the study provides data by means of which allowance can be made for the effect of the assumption. *Hearing Before Senate Subcommittee, supra* at 12.

No such allowance was made. Indeed, the data relied upon by the Commission in its interim report discloses nothing with respect to the lead time allowed to supply cars.

sion had repeatedly testified at other times and in other proceedings that a service standard requiring placement of cars upon 24 hours' notice was unreasonable and particularly so during harvest time (*E.g.*, Transcript of Ex Parte 241 Hearings, pp. 356-358, 1324-36; Transcript of Ex Parte 252 Hearings, pp. 256-257). The acquisition and maintenance of a "car supply adequate to meet the needs of commerce" is, under section 1(14)(a), an essential part of the standards for Commission imposition of incentive per diem. Evidence as to the reasonableness of the standard applied by the Commission to measure adequacy of car service is directly relevant to the statutory authority under which the Commission acted.

III. Further Proceedings Required in the District Court in the Event of Reversal

The brief for the Government specifies as the third question presented whether the FEC should be ordered to "make restitution of the incentive per diem charges [it] would have paid but for the order of the court below. . . ." (Brief for Appellants at 2). The brief for the Government answers the question in the affirmative assuming, of course, reversal of the judgment of the court below (Brief for Appellants at 28-30).

1. The "restitution" question was not raised in the jurisdictional statement. There is, therefore, some doubt, in view of Rule 40(1)(d)(2) of this Court, whether the Government may now raise the question.

2. In any event, the question is premature. FEC, as well as Seaboard Coast Line Railroad, raised a number of substantial issues as to the validity of the order of the Commission upon which the district court expressly

reserved decision. The opinion of the district court states:

Seaboard, in its attack upon the actions of the Commission, alleges (1) that the Commission failed to afford it a proper hearing and that such failure prejudiced Seaboard, (2) that the Commission failed to comply with the requirements of Section 1(14)(a) of the Act, and (3) that the Report and order of the Commission does not contain reasons and findings sufficient to support the Commission's conclusions. FEC joins in Seaboard's arguments that it was improper for the Commission to act without further hearings and that the Commission's conclusions are not based on substantial evidence, and also adds the contentions that (1) the Commission's order is so unreasonable as to deny due process and (2) that the Commission should have exempted FEC from incentive per diem payments. Since we find that the Commission acted illegally in denying the plaintiff railroads a hearing before the imposition of the incentive per diem charges, we pretermitt discussion of all but the first point. (J.S. App. 5a)

This Court does not perform the initial judicial review of orders of the Interstate Commerce Commission; that function is performed by statutory three-judge district courts. This Court acts on appeals from judgments of statutory three-judge district courts and does not undertake initial review of issues not considered or disposed of by the court below. The general practice in cases where the judgment of a district court is reversed on limited issues is to remand the case for further proceedings in the district court. *E.g.*, *Seaboard Air Line R.R. v. United States*, 382 U.S. 154.

3. FEC is entitled to judicial review of the substantial issues raised by the pleadings and not resolved by

the district court. This review should initially be undertaken by the district court. The scope of that review will be affected by a decision that, in fixing compensation to be paid for freight cars, the Commission is not required by section 1(14)(a) to give FEC opportunity for cross-examination or presentation of witnesses. FEC is entitled to a hearing on its claims at some point in this compensation proceeding. *Jordan v. American Eagle Fire Ins. Co.*, *supra* at 288-90. Judicial review of freight car compensation orders of the Commission normally is limited. *Union Pacific R.R. v. United States*, *supra* at 323; *cf.*, *Allegheny-Ludlum*, 40 U.S.L.W. at 4669. If, however, Commission action is not required to be made on the record after opportunity for agency hearing, FEC is entitled to a trial *de novo* in the district court on the reasonableness of the order. *Cf.*, *Jordan v. United Ins. Co. of America*, 289 F.2d 778 (D.C. Cir. 1961). Trial *de novo* in the district court is contemplated by section 706(2) of the Administrative Procedure Act in these circumstances. Senate Comparative Print, June 1945, p. 20 (Senate Judiciary Committee Print, Administrative Procedure Act, Legislative History, Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 39-40 (1946)); H.R. Rep. 1980, 79th Cong., 2d Sess., p. 45 (1946) (Sen. Doc. No. 248, p. 279).

If the judgment of the court below is reversed, the appropriate procedure is to remand the case to the district court for further proceedings, including an initial determination of whether the equitable doctrine of restitution requires payment by FEC of incentive compensation for any past period of time.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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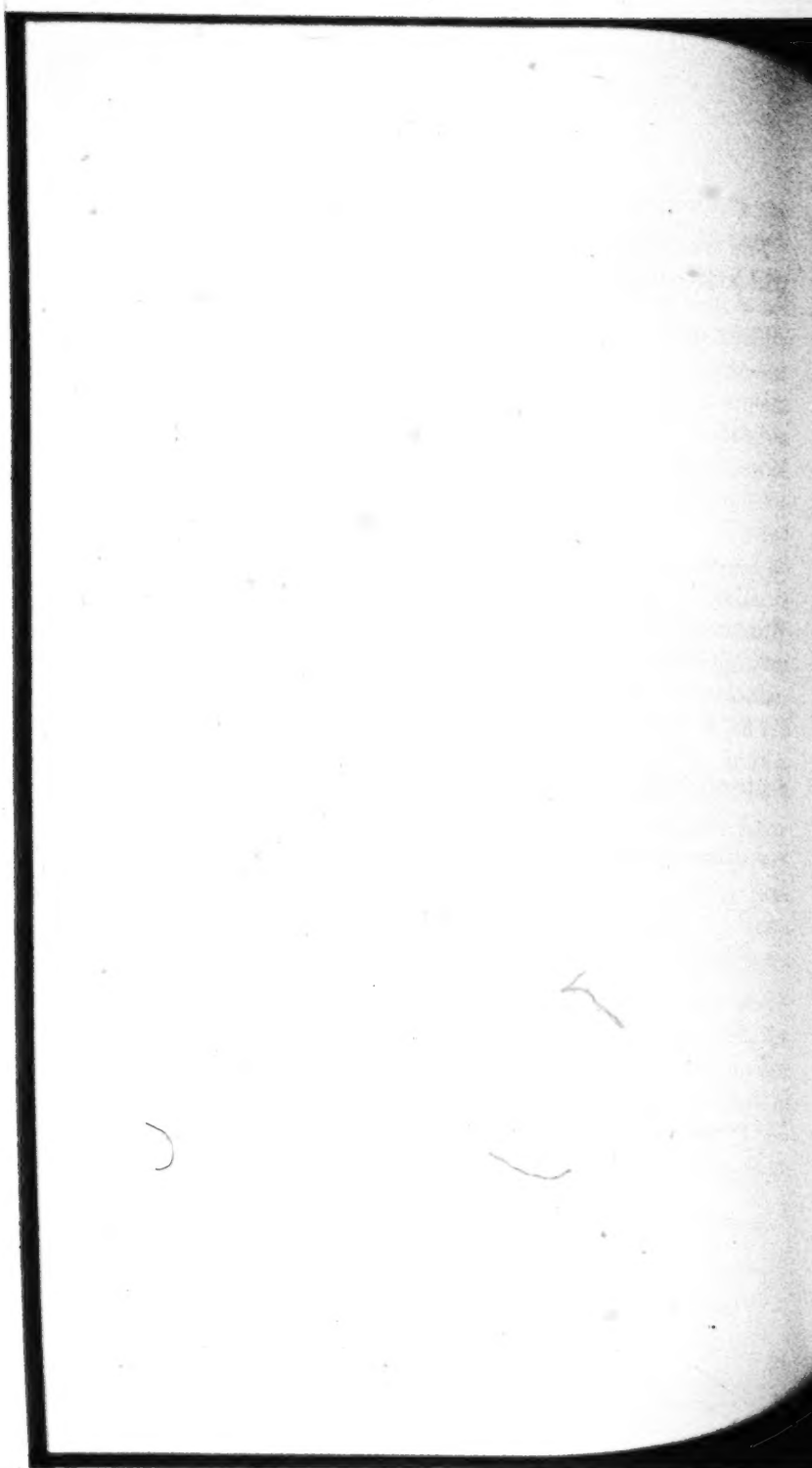
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September 1972



APPENDIX

APPENDIX

STATUTES INVOLVED

Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), provides as follows:

(14) (a) The Commission may, after hearing, . . . establish . . . the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier). . . . In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. § 1(15), provides as follows:

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it

so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: . . . (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable. . . .

Section 553(c) of the Administrative Procedure Act, 5 U.S.C. § 553(c), provides as follows:

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556(a) of the Administrative Procedure Act, 5 U.S.C. § 556(a), provides as follows:

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d), provides as follows:

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the

exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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STATE

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 70-279

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS**

v.

**FLORIDA EAST COAST RAILWAY COMPANY AND SEABOARD
COAST LINE RAILROAD COMPANY**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA**

**REPLY BRIEF FOR THE UNITED STATES AND THE
INTERSTATE COMMERCE COMMISSION**

1. In *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-758, this Court held that Sections 556 and 557 of the Administrative Procedure Act, 5 U.S.C. 556, 557, are inapplicable to the promulgation of car service rules under Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a). FEC attempts to distinguish *Allegheny-Ludlum* by suggesting that, while the Commission may have been engaged in legislative rulemaking in promulgating the car service rules under review in that case, it was acting in a quasi-judicial capacity in prescribing incentive per diem rules here and that therefore *Alle-*

gheny-Ludlum is not controlling (FEC Br. 11-14, 21-24). The short answer to this contention is that in both instances the Commission was engaged in rule-making and Section 1(14)(a), under which both sets of rules were promulgated, does not require one type of hearing when car service rules are under consideration and a different type of hearing when car-hire rules are under consideration. The first part of Section 1(14)(a), originally enacted as part of the Esch Car Service Act of 1917, 40 Stat. 101, provides that the Commission may "after hearing * * * establish reasonable rules, regulations, and practices with respect to car service * * * including the compensation to be paid" for the use of any freight car not owned by the carrier using it.¹ The 1966 amendment, 80 Stat. 168, merely appended to this basic rulemaking power the authority to determine "[i]n fixing such compensation" whether it should be increased by an incentive element; the 1966 amendment did not alter the "hearing" requirement contained in the beginning of Section 1(14)(a).

Seaboard, in its attempt to distinguish *Allegheny-Ludlum*, contends (Br. 11-16) that the 1966 amendment did indeed alter the "hearing" requirement since the amendment requires the Commission, prior to establishing incentive per diem rules, to take certain

¹ This Court has recognized that the establishment of car-hire rates under Section 1(14)(a) is an exercise of "the Commission's recognized rule-making power". *Boston & Maine R. v. United States*, 358 U.S. 68, 70. And there is no doubt that the promulgation of per diem rules comes within the definition of rulemaking in the Administrative Procedure Act. See 5 U.S.C. 551 (4) and (5).

factors into consideration and "on the basis of such consideration" to make certain determinations. 49 U.S.C. 1(14)(a). But the requirement that the Commission act only after making certain determinations on the basis of several considerations is simply a requirement that the Commission make certain legislative findings. Nothing in the statute suggests that these determinations must be made "on the record" of the hearing required by the first part of Section 1(14)(a). Under Section 553(c) of the Administrative Procedure Act, only where rules must be made "on the record" after an agency hearing, do Sections 556 and 557 of the Act become applicable. Thus, Sections 556 and 557 are no more applicable to incentive per diem rulemaking proceedings than they are to the car service rulemaking proceedings that were under review in *Allegheny-Ludlum*.

2. Assuming that Section 556 of the Administrative Procedure Act does apply here, Seaboard argues (Br. 37-38) that it is not necessary to show "prejudice" to be entitled to an oral hearing under that Section since the first part of Section 556(d) confers an absolute right to "such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d). The structure of Section 556(d) makes clear, however, that the rights conferred by the first part of the Section are limited by the Section's last sentence, authorizing agencies to dispense with oral hearings "when a party will not be prejudiced thereby."

3. In response to our argument that Commission personnel involved in the decisional process are not

subject to cross-examination (Gov't Br. 25-26), FEC asserts that in requesting an oral hearing it was merely seeking to compel testimony by Commission employees who had testified in prior Commission proceedings and are "field agents, data assemblers, and car supply directors" (FEC Br. 27-28). FEC contends (Br. 28) that these employees prepared the statistical studies and field audits on which the Commission relied in issuing its interim report. While Commission "field agents" did prepare field audits referred to by the Commission (see, *e.g.*, J.S. App. 65a-66a), no "data assemblers" or "car supply directors" prepared the statistical analyses on which the Commission relied. The Commission personnel who assisted the Commission in analyzing the data from the 1968 freight car study were all from the Commission's central staff² and were engaged in the decisional process.

With respect to the field agents, FEC asserts (Br. 31-33) the need to cross-examine them to test their finding in conducting field audits in connection with the 1968 study that the car orders reported by the railroads were not significantly distorted by overordering by shippers. In only 3.5 percent of the audits did the agents find any affirmative evidence of overordering (J.S. App. 65a-66a). Cross-examination to probe the methodology of the agents in conducting the audits, however, would be of very limited utility, at best, since

² The only exception was the Commission's Bureau of Enforcement which was a party to the proceeding before the Commission and submitted its comments to the Commission with service on all the parties (see App. 187, 198).

the 1968 study itself confirmed the absence of significant overordering. The study revealed that the railroads actually placed plain boxcars against 98.7 percent of the orders for such cars reported in the study (J.S. App. 66a).³

In more general terms, FEC asserts (Br. 33-36) that it needed to cross-examine responsible staff members of the Commission to show that they might disagree with some of the Commission's conclusions. Seaboard asserts a similar need to test the "opinions of ICC personnel" and whatever "Commission thinking" led to the promulgation of the incentive per diem rules (Br. 34-35). The Commission was not obligated, however, to make available for cross-examination the staff assistants who aided in the decisional process or other employees who might disagree with the conclusions of the Commission. Both the statistical analyses on which the Commission relied and the underlying data were available to the carriers and they were given the opportunity to present their own critical analyses in writing. And whether the opinions of the members of the Commission's staff were in conformity with

³The large amount of overordering of cars reflected in the prior incentive case of 1967 (*Incentive Per Diem Charges*, 332 I.C.C. 11), to which FEC refers (Br. 32-33), led the Commission to undertake the wholly fresh study of freight car supply and demand in 1968 before adopting any incentive plan (see J.S. App. 52a-53a). The excess orders to which FEC refers in Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 305-306, were part of the same data collected by the Association of American Railroads which the Commission here rejected in 1967 and replaced in 1968 (compare 335 I.C.C. at 278-281, 284, and J.S. App. 52a).

the Commission's decision is of little relevance here, since it is the Commission, and not its employees, in which Congress has vested the final responsibility for resolving the specialized questions involved here. Finally, in a case of this nature, a carrier is not entitled to cross-examine Commissioners to determine whether they truly support a reported decision;⁴ similarly, no party is entitled to cross-examine a Commissioner's assistant to determine whether his opinions agreed with the views of his superior. See *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 790 (S.D. Tex.), affirmed *sub nom. Herrin Transportation Co. v. United States*, 366 U.S. 419.

3. Seaboard argues (Br. 36) that the Commission "overlooked" shipper and carrier interests in the Southeast and that this omission would have been cured by an oral hearing. This argument, however, is simply a variation of Seaboard's primary contention that the incentive charges should have applied to its specially equipped boxcars, as well as to the general service, unequipped boxcars (Br. 33-36, 43-46, 49-52). The Commission gave careful consideration to Seaboard's argument, stating that there already were sufficient incentives for Seaboard and other such railroads to purchase specially equipped cars and that those carriers were sufficiently compensated for the operation of the more modern and more expensive

⁴Since the Commission issued detailed reports and made legislative findings in accordance with the requirements of Section 1(14)(a) of the Interstate Commerce Act, this case does not fall within the rule that administrative officials acting without making findings may be required to testify to explain their acts. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420.

cars in the larger per diem payments resulting from the application of normal, compensatory per diem charges (J.S. App. 91a-92a).

4. The Commission adequately considered each of the points FEC briefly raised in its two and one-half page request for an oral hearing, after finding that it had considered all the facts and statements of the parties and no party had been prejudiced by the absence of an oral hearing (J.S. App. 87a-88a). For example, when FEC joined Penn Central in attacking the Commission's concept of "deficiencies" as a failure to supply cars ordered by shippers,⁵ the Commission responded that the carriers' failures to meet car orders could not be excused by their operating insufficient train schedules, and that such delays in filling orders were "properly considered * * * in determining whether the availability of cars was sufficient to meet the shippers' demands for service" (J.S. App. 69a).

5. FEC asserts (Br. 36-38) that in the event this Court reverses the judgment of the district court, the case should be remanded to the district court for the resolution of issues not considered by the district court in the first instance (see J.S. App. 5a).⁶ Sea-

⁵FEC merely urged before the Commission that deficiencies may not be affected by the supply of cars (J.S. App. 47a), which it now equates with Penn Central's argument that deficiencies resulted from insufficient train service schedules rather than a lack of cars (FEC Br. 31).

⁶FEC's contention (Br. 37-38) that it is entitled to a *de novo* trial before the district court is plainly insubstantial. As this Court held in *United States v. Allegheny-Ludlum, supra*, 406 U.S. at 748-749, the scope of judicial review of Commission rulemaking orders promulgated under Section 1(14)(a) of the Interstate Commerce Act is sharply limited. See *United States v. Jones*, 336 U.S. 641, 673.

board, on the other hand, discusses those issues in its brief (Br. 41-55) and urges the Court to consider them as a basis for affirmance even if the Court concludes that no oral hearings were required. In our view, these remaining issues—which essentially are whether the Commission's order is "reasonable" as required by Section 1(14)(a), whether the order contains appropriate findings and is based on substantial evidence, and whether FEC should have been exempted from the incentive rules—are not substantial; accordingly we urge the Court to affirm the Commission's order without further proceedings before the district court.

Seaboard contends that the Commission's order is not reasonable and that certain factors required to be taken into account by Section 1(14)(a) were not considered (Br. 43-46). Seaboard's contention that the rules are not reasonable is based primarily on its assertion that it was unduly burdensome to Seaboard to prescribe incentive per diem rules for plain boxcars alone. As we have noted (pp. 6-7, *supra*), the Commission considered and rejected this contention. Seaboard's argument that the national car supply was not considered is based on the allegation that the Commission studied only two zones of the country (Br. 45). In fact, the 1968 study was based on reports from railroads in each of six geographic areas or zones covering the continental United States (J.S. App. 62a), and the Commission specifically found car shortages "throughout a large part of the country" (J.S. App. 88a).

Seaboard also objects that the Commission failed to find categorically that the incentive rules will improve the supply and utilization of cars (Br. 48-49) and contends that the Commission acted on an insufficient factual base in establishing the level of incentive payments (Br. 53-55). But obviously the Commission could not predict with certainty the outcome of its order or whether slightly higher or slightly lower incentive rates would be preferable. It is enough that, in the Commission's expert judgment based on prolonged study, the rules were reasonably designed to improve the supply and utilization of freight cars; the Commission recognized that "as we gain experience under the incentive per diem charges adopted herein, modification or expansion of the rules and charges may well be required" (J.S. App. 91a).

FEC argues (Br. 4-5) that the incentive charges would not improve car utilization or efficiency on its lines, citing the statements of its officials made before the Commission. The Commission considered FEC's contention in depth. It found that FEC, although a terminating road with no interest in direct purchases of additional equipment, "can be expected to contribute to improved car utilization, given the incentive to do so" (J.S. App. 100a).⁷ The Commission added that FEC in any event has a substantial interest in the maintenance of a national car supply,

⁷ Several "car distribution directions" entered by the staff of the Commission in 1969 and 1970 to require FEC to return excess cars on its line to other railroads in need of them were made a part of the record in the district court at the hearing on the motion for a temporary restraining order.

albeit "indirectly by better enabling the creditor roads to augment the car fleet"; FEC "should in fairness bear a portion of the cost of these additional risks" borne by the creditor roads beyond that included in the basic per diem charges when the creditor roads undertake to buy cars beyond their own normal requirements to alleviate a national shortage (*ibid.*). The Commission is empowered "to restore incentive to the various roads to augment their supply of freight cars, even at the temporary expense of optimum utilization of the existing fleet of freight cars." *United States v. Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 754. It follows that the Commission is empowered to adopt the rules here in issue which serve not only to augment the fleet, but to increase utilization of the existing fleet as well.

6. Finally, *Seaboard* argues (Br. 57-59) that it should not be ordered to make restitution in the event the Commission's order is upheld by this Court, since there has been no "wrong" as a result of its obtaining a stay delaying the effective date of the incentive per diem rules against it. It cannot be denied, however, that but for the stay, FEC and Seaboard would have paid other carriers incentive charges for the use of the other carriers' plain boxcars during certain months of the year. In the event the government ultimately prevails in this case, FEC and Seaboard should be required to make good the payments they would have made but for the stay, offset, of course, by the incentive monies they would have collected

from other carriers using FEC's and Seaboard's cars.^{*}

CONCLUSION

For the foregoing reasons and for the reasons stated in our main brief, the judgment of the district court should be reversed and restitution should be required of FEC and Seaboard.

Respectfully submitted.

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DECEMBER 1972.

^{*} If restitution is ordered, the customary method of settling balances of per diem accounts will be used (see J.S. App. 113a).

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

No. 70-279

United States et al., Appellants, v. Florida East Coast Railway Company et al.	}	On Appeal from the United States District Court for the Middle District of Florida.
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[January 22, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees, two railroad companies, brought this action in the District Court of the Middle District of Florida to set aside the incentive per diem rates established by appellant Interstate Commerce Commission in a rule-making proceeding. *Incentive Per Diem Charges—1968, Ex parte No. 252 (Sub No. 1)*. They challenged the order of the Commission on both substantive and procedural grounds. The District Court sustained appellees' position that the Commission had failed to comply with the applicable provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, and therefore set aside the order without dealing with the railways' other contentions. The District Court held that the language of § 1 (14)(a)¹ of the Interstate Commerce

¹ Section 1 (14)(a) provides:

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobserv-

Act, 49 U. S. C. § 1 (14)(a), required the Commission in a proceeding such as this to act in accordance with § 7 (d) of the Administrative Procedure Act, 5 U. S. C. § 556 (d) and that the Commission's determination to receive submissions from the appellees only in written form was a violation of that section because the respondents were "prejudiced" by that determination within the meaning of that section.

Following our decision last Term in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972), we noted probable jurisdiction, 407 U. S. 908 (1972), and requested the parties to brief the question of whether the Commission's proceeding was governed by 5 U. S. C. § 553,¹

ance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

¹ "§ 553 Rule making

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rule making shall be published

or by §§ 556³ and 557,⁴ of the Administrative Procedure Act. We here decide that the Commission's proceeding was governed only by § 553 of that Act,

in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

"(1) a statement of the time, place, and nature of public rule making proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

"Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

³"§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

"(a) This section applies, according to the provisions thereof, to

[Footnote 4 is on p. 5]

and that appellees received the "hearing" required by § 1 (14)(a) of the Interstate Commerce Act. We therefore reverse the judgment of the District Court and

hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

"(b) There shall preside at the taking of evidence—

"(1) the agency;

"(2) one or more members of the body which comprises the agency; or

"(3) one or more hearing examiners appointed under section 3106 of this title.

"This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

"(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

"(1) administer oaths and affirmations;

"(2) issue subpoenas authorized by law;

"(3) rule on offers of proof and receive relevant evidence;

"(4) take depositions or have depositions taken when the ends of justice would be served;

"(5) regulate the course of the hearing;

"(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

"(7) dispose of procedural requests or similar matters;

"(8) make or recommend decisions in accordance with section 557 of this title; and

"(9) take other action authorized by agency rule consistent with this subchapter.

"(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repeti-

remand the case to that court for further consideration of appellees' other contentions that were raised there but which we do not decide.

tious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."

"§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

"(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

"(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title

I. BACKGROUND OF CHRONIC FREIGHT CAR SHORTAGES

This case arises from the factual background of a chronic freight car shortage on the Nation's railroads which we described in *United States v. Allegheny-Ludlum Steel Corp.*, *supra*. Judge Simpson, writing for the District Court in this case, noted that "[f]or a number of years portions of the nation have been plagued with seasonal shortages of freight cars in which to ship goods." 322 F. Supp. 725, 726 (MD Fla. 1971). Judge Friendly, writing for a three-judge District Court in the Eastern District of New York in the related case of *Long Island R. Co. v. United States*, 318 F. Supp. 490, 491 (EDNY 1970), described the Commission's order as "the latest chapter in a long history of freight car shortages in

shall first recommend a decision, except that in rule making or determining applications for initial licenses—

"(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

"(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

"(1) proposed findings and conclusions; or

"(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

"(3) supporting reasons for the exceptions or proposed findings or conclusions.

"The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

"(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

"(B) the appropriate rule, order, sanction, relief or denial thereof."

certain regions and seasons and of attempts to ease them." Congressional concern for the problem was manifested in the enactment in 1966 of an amendment to § 1 (14)(a) of the Interstate Commerce Act, enlarging the Commission's authority to prescribe per diem charges for the use by one railroad of freight cars owned by another. Pub. L. 89-430, 80 Stat. 168. The Senate Committee on Commerce stated in its report accompanying this legislation:

"Car shortages, which once were confined to the Mid-West during harvest seasons, have become increasingly more frequent, more severe, and nationwide in scope as the national freight car supply has plummeted." S. Rep. No. 386, 89th Cong., 1st Sess., pp. 1-2.

The Commission in 1966 commenced an investigation *Ex parte* No. 252, Incentive Per Diem Charges, "[t]o determine whether information presently available warranted the establishment of an incentive element increase, on an interim basis, to apply pending further study and investigation." 332 I. C. C. 11, 12 (1967). Statements of position were received from the Commission staff and a number of railroads. Hearings were conducted at which witnesses were examined. In October 1967, the Commission rendered a decision discontinuing the earlier proceeding, but announcing a program of further investigation into the general subject.

In December 1967, the Commission initiated the rule-making procedure giving rise to the order which appellees here challenge. It directed Class I and Class II line-haul railroads to compile and to report detailed information with respect to freight car demand and supply at numerous sample stations for selected days of the week during 12 four-week periods beginning January 29, 1968.

Some of the affected railroads voiced questions about the proposed study or requested modification in the study procedures outlined by the Commission in its notice of proposed rulemaking. In response to petitions setting forth these carriers' views, the Commission staff held an informal conference in April 1968, at which the objections and proposed modifications were discussed. Twenty railroads, including appellee Seaboard, were represented at this conference, at which the Commission's staff sought to answer questions about reporting methods to accommodate individual circumstances of particular railroads. The conference adjourned on a note that undoubtedly left the impression that hearings would be held at some future date. A detailed report of the conference was sent to all parties to the proceeding before the Commission.

The results of the information thus collected were analyzed and presented to Congress by the Commission during a hearing before the Subcommittee on Surface Transportation of the Senate Committee on Commerce in May 1969. Members of the Subcommittee expressed dissatisfaction with the Commission's slow pace in exercising the authority which had been conferred upon it by the 1966 Amendments to the Interstate Commerce Act. Judge Simpson in his opinion for the District Court said:

"Members of the Senate Subcommittee, on Surface Transportation expressed considerable dissatisfaction with the Commission's apparent inability to take effective steps towards eliminating the national shortage of freight cars. Comments were general that the Commission was conducting too many hearings and taking too little action. Senators pressed for more action and less talk, but Commission counsel expressed doubt respecting the Commission's statutory power to act without additional hearings." 322 F. Supp., at 727.

Judge Friendly, describing the same event in *Long Island R. Co. v. United States, supra*, said:

"To say that the presentation was not received with enthusiasm would be a considerable understatement. Senators voiced displeasure at the Commission's long delay at taking action under the 1966 Amendment, engaged in some merriment over what was regarded as an unintelligible discussion of methodology . . . and expressed doubt about the need for a hearing But the Commission's general counsel insisted that a hearing was needed . . . and the Chairman of the Commission agreed" 318 F. Supp., at 494.

The Commission, now apparently imbued with a new sense of mission, issued in December 1969 an interim report announcing its tentative decision to adopt incentive per diem charges on standard box cars based on the information compiled by the railroads. The substantive decision reached by the Commission was that so-called "incentive" per diem charges should be paid by any railroad using on its lines a standard box car owned by another railroad. Before the enactment of the 1966 amendment to the Interstate Commerce Act, it was generally thought that the Commission's authority to fix per diem payments for freight car use was limited to setting an amount that reflected fair return on investment for the owning railroad, without any regard being had for the desirability of prompt return to the owning line or for the encouragement of additional purchases of freight cars by the railroads as a method of investing capital. The Commission concluded however, that in view of the 1966 amendment it could impose additional "incentive" per diem charges to spur prompt return of existing cars and to make acquisition of new cars financially attractive to the railroads. It

did so by means of a proposed schedule that established such charges on an across-the-board basis for all common carriers by railroads subject to the Interstate Commerce Act. Embodied in the report was a proposed rule adopting the Commission's tentative conclusions and a notice to the railroads to file statements of position within 60 days, couched in the following language:

"That verified statements of facts, briefs, and statements of position respecting the tentative conclusions reached in the said interim report, the rules and regulations proposed in the Appendix to this order, and any other pertinent matter, are hereby invited to be submitted pursuant to the filing schedule set forth below by any interested person whether or not such person is already a party to this proceeding.

"That any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced." 49 CFR § 1036.

Both appellee railways filed statements objecting to the Commission's proposal and requesting an oral hearing, as did numerous other railroads. In April 1970, the Commission, without having held further "hearings," issued a supplemental report, making some modifications in the tentative conclusions earlier reached, but overruling *in toto* the requests of appellees Seaboard and Florida East Coast.

The District Court held that in so doing the Commission violated § 556 (d) of the Administrative Procedure Act, and it was on this basis that it set aside the order of the Commission.

II. APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

In *United States v. Allegheny-Ludlum Steel Corp.*, *supra*, we held that the language of § 1 (14)(a) of the Interstate Commerce Act authorizing the Commis-

sion to act "after hearing" was not the equivalent of a requirement that a rule be made "on the record after opportunity for an agency hearing" as the latter term is used in § 553 (c) of the Administrative Procedure Act. Since the 1966 amendment to § 1 (14)(a), under which the Commission was here proceeding, does not by its terms add to the hearing requirement contained in the earlier language, the same result should obtain here unless that amendment contains language that is tantamount to such a requirement. Appellees contend that such language is found in the provisions of that Act requiring that:

"The Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of this national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed"

While this language is undoubtedly a mandate to the Commission to consider the factors there set forth in reaching any conclusion as to imposition of per diem incentive charges, it adds to the hearing requirements of the section neither expressly nor by implication. We know of no reason to think that an administrative agency in reaching a decision cannot accord consideration to factors such as those set forth in the 1966 amendment by means other than a trial-type hearing or the presentation of oral argument by the affected parties. Congress by that amendment specified necessary components of the ultimate decision, but it did not specify the method by which the Commission should acquire information about those components.⁵

⁵The Court of Appeals for the Ninth Circuit reached a result similar to that which we reach in *Pacific Coast European Conference v. United States*, 350 F. 2d 197 (1965). Construing the

Both of the district courts which reviewed this order of the Commission concluded that its proceedings were governed by the stricter requirements of §§ 556 and 557 of the Administrative Procedure Act rather than by the provisions of § 553 alone.* The conclusion of the District Court for the Middle District of Florida,

authority of the Federal Maritime Commission under § 14b of the Shipping Act of 1916, as amended, 46 U. S. C. § 813a (Supp. V, 1964), that court observed that "... the authority of the Commission to permit such contracts was limited by requiring that the contracts in eight specified respects meet the Congressional judgment as to what they should include." 350 F. 2d, at 201. Notwithstanding these explicit directions that particular factors be considered by the Commission in reaching its decision the court held that the statute's requirements of "notice and hearing" were not sufficient to bring into play the provisions of §§ 556 and 557 of the Administrative Procedure Act.

*Both district court opinions were handed down before our decision in *United States v. Allegheny-Ludlum Steel Corp.*, and it appears from the record before us that the Government in those courts did not really contest the proposition that the Commission's proceedings were governed by the stricter standards of §§ 556 and 557.

The dissenting opinion of Mr. Justice Douglas relies in part on indications by the Commission that it proposed to apply the more stringent standards of §§ 556 and 557 of the Administrative Procedure Act to these proceedings. This Act is not legislation for which the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An agency interpretation involving at least in part the provisions of that Act does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency "charged with the responsibility" of administering a particular statute does. See *United States v. American Trucking Assn., Inc.*, 310 U. S. 534 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294 (1933). Moreover, since any agency is free under the Act to accord litigants appearing before it more procedural rights than the Act requires, the fact that an agency may choose to proceed under §§ 556 and 557 does not carry the necessary implication that the agency felt it was required to do so.

which we here review, was based on the assumption that the language in § 1 (14)(a) of the Interstate Commerce Act requiring rulemaking under that section to be done "after hearing" was the equivalent of a statutory requirement that the rule "be made on the record after opportunity for an agency hearing." Such an assumption is inconsistent with our decision in *Allegheny-Ludlum, supra*.

The District Court for the Eastern District of New York reached the same conclusion by a somewhat different line of reasoning. That court felt that because § 1 (14)(a) of the Interstate Commerce Act had required a "hearing," and because that section was originally enacted in 1917, Congress was probably thinking in terms of a "hearing" such as that described in the opinion of this Court in the roughly contemporaneous case of *ICC v. Louisville & Nashville R. Co.*, 227 U. S. 88, 93 (1913). The ingredients of the "hearing" were there said to be that "all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." Combining this view of congressional understanding of the terms "hearing" with comments by the Chairman of the Commission at the time of the adoption of the 1966 legislation regarding the necessity for "hearings," that court concluded that Congress had in effect required that these proceedings be "on the record after an opportunity for agency hearing" within the meaning of § 553 of the Administrative Procedure Act.

Insofar as this conclusion is grounded on the belief that the language "after hearing" of § 1 (14)(a) without more would trigger the applicability of §§ 556 and 557, it, too, is contrary to our decision in *Allegheny-Ludlum, supra*. The District Court observed that it was "rather

hard to believe that the last sentence of § 553 (c) was directed only to the few legislative sports where the words 'on the record' or their equivalent had found their way into the statute book." 318 F. Supp., at 496. This is, however, the language which Congress used, and since there are statutes on the books that do use these very words, see, *e. g.*, the Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. § 43a, and 21 U. S. C. § 371 (e)(3), the regulations provision of the Food and Drug Act, adherence to that language cannot be said to render the provision nugatory or ineffectual. We recognized in *Allegheny-Ludlum* that the actual words "on the record" and "after . . . hearing" used in § 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings. But we adhere to our conclusion expressed in that case that the phrase "after hearing" in § 1 (14)(a) of the Interstate Commerce Act does not have such an effect.

III. "HEARING" REQUIREMENT OF § 1 (14)(a) OF THE INTERSTATE COMMERCE ACT

Inextricably intertwined with the hearing requirement of the Administrative Procedure Act in this case is the meaning to be given to the language "after hearing" in § 1 (14)(a) of the Interstate Commerce Act. Appellees both here and in the court below contend that the Commission procedure here fell short of that required by the "hearing" requirement of § 1 (14)(a), even though it may have satisfied § 553 of the Administrative Procedure Act. The Administrative Procedure Act states that none of its provisions "limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U. S. C. § 559. Thus even though the Commission was not required to comply with §§ 556 and 557 of that Act, it was required to accord the "hear-

ing" specified in § 1 (14) (a) of the Interstate Commerce Act. Though the District Court did not pass on this contention, it is so closely related to the claim based on the Administrative Procedure Act that we proceed to decide it now.

If we were to agree with the reasoning of the District Court for the Eastern District of New York with respect to the type of hearing required by the Interstate Commerce Act, the Commission's action might well violate those requirements, even though it was consistent with the requirements of the Administrative Procedure Act.

The term "hearing" in its legal context undoubtedly has a host of meanings.⁷ Its meaning undoubtedly will vary depending on whether it is used in the context of a rulemaking type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts. It is by no means apparent what the drafters of the Esch Car Service Act of 1917, 40 Stat. 101, which became the first part of § 1 (14) (a) of the Interstate Commerce Act, meant by the term. Such an intent would surely be an ephemeral one, if indeed Congress in 1917 had in mind anything more specific than the language it actually used, for none of the parties refer to any legislative history which would shed light on the intended meaning of the words "after hearings." What is apparent, though, is that the term was used in granting authority to the Commission to make rules and regulations of a prospective nature.

Appellees refer us to testimony of the Chairman of the Commission to the effect that if the added authority ultimately contained in the 1966 amendment were enacted, the Commission would proceed with "great caution" in imposing incentive per diem rates, and to statements of both Commission personnel and Members

⁷ See 1 Davis, Administrative Law Treatise, § 605 (1958).

of Congress as to the necessity for a "hearing" before Commission action. Certainly the lapse of time of more than three years between the enactment of the 1966 amendment and the Commission's issuance of its tentative conclusions cannot be said to evidence any lack of caution on the part of that body. Nor do generalized references to the necessity for a hearing advance our inquiry, since the statute by its terms requires a "hearing"; the more precise inquiry of whether the hearing requirements necessarily include submission of oral testimony, cross-examination, or oral arguments is not resolved by such comments as these.

Under these circumstances, confronted with a grant of substantive authority made after the Administrative Procedure Act was enacted,^{*} we think that reference to that Act, in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term "hearing" used in another statute. Turning to that act, we are convinced that the term "hearing" as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker.

Section 553 excepts from its requirements rulemaking devoted to "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," and rulemaking "when an agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public

^{*} The Interstate Commerce Act was amended in May 1966; the Administrative Procedure Act was significantly amended in September 1966, but the section detailing the procedures to be used in rulemaking is substantially similar to the original provision in the 1946 Administrative Procedure Act. See Pub. L. 79-404, 60 Stat. 238.

interest." This exception does not apply, however, "when notice or hearing is required by statute"; in those cases, even though interpretative rulemaking be involved, the requirements of § 553 apply. But since these requirements themselves do not mandate any oral presentation, see *Allegheny-Ludlum, supra*, it cannot be doubted that a statute that requires a "hearing" prior to rulemaking may in some circumstances be satisfied by procedures which meet only the standards of § 553. The Court's opinion in *FPC v. Texaco, Inc.*, 377 U. S. 33 (1964), supports such a broad definition of the term "hearing."

Similarly, even where the statute requires that the rulemaking procedure take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection *d* provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby." Again the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.

We think this treatment of the term "hearing" in the Administrative Procedure Act affords a sufficient basis for concluding that the requirement of a "hearing" contained in § 1 (14)(a), in a situation where the Commission was acting under the 1966 statutory rulemaking authority which Congress had conferred upon it, did not by its own force require the Commission either to hear oral testimony, to permit cross-examination of Commission witnesses, or to hear oral argument. Here the Commission promulgated a tentative draft of an order, and accorded all interested parties 60 days in which to file statements of position, submissions of evidence, and other relevant observations. The parties had fair notice of exactly what the Commission proposed to do,

and were given an opportunity to comment, to object, or to make some other form of written submission. The final order of the Commission indicates that it gave consideration to the statements of the two appellees here. Given the "open-ended" nature of the proceedings, and the Commission's announced willingness to consider proposals for modification after operating experience had been acquired, we think the hearing requirement of § 1 (14)(a) of the Act was met.

Appellee railroads cite a number of our previous decisions dealing in some manner with the right to a hearing in an administrative proceeding. Although appellees have asserted no claim of constitutional deprivation in this proceeding, some of the cases they rely upon expressly speak in constitutional terms, while others are less than clear as to whether they depend upon the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, or upon generalized principles of administrative law formulated prior to the adoption of the Administrative Procedure Act.

Morgan v. United States, 304 U. S. 1 (1938), is cited in support of appellees' contention that the Commission's proceedings were fatally deficient. That opinion describes the proceedings there involved as "quasi-judicial," *id.*, at 14, and thus presumably distinct from a rulemaking proceeding such as that engaged in by the Commission here. But since the order of the Secretary of Agriculture there challenged did involve a form of rulemaking, the case bears enough resemblance to the facts of this case to warrant further examination of appellees' contention. The administrative procedure in *Morgan* was held to be defective primarily because the persons who were to be affected by the Secretary's order were found not to have been adequately apprised of what the Secretary proposed to do prior to the time

that he actually did it. Illustrative of the Court's reasoning is the following passage from the opinion:

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposal before it issues its final command." 304 U. S., at 19.*

The proceedings before the Secretary of Agriculture had been initiated by a notice of inquiry into the reasonableness of the rates in question, and the individuals being regulated suffered throughout the proceeding from its essential formlessness. The Court concluded that this formlessness denied the individuals subject to regulation the "full hearing" which the statute had provided.

Assuming *arguendo* that the statutory term "full hearing" does not differ significantly from the hearing requirement of § 1 (14)(a), we do not believe that the proceedings of the Interstate Commerce Commission before us suffer from the defect found to be fatal in *Morgan*. Though the initial notice of the proceeding by no means set out in detail what the Commission

* This same language was cited with approval by the Court in *Wilner v. Committee on Character*, 373 U. S. 96, 105 (1963), in which it was held that an applicant for admission to the bar could not be denied such admission on the basis of *ex parte* statements of others whom he had not been afforded an opportunity to cross-examine.

proposed to do, its tentative conclusions and order of December 1969, could scarcely have been more explicit or detailed. All interested parties were given 60 days following the issuance of these tentative findings and order in which to make appropriate objections. Appellees were "fairly advised" of exactly what the Commission proposed to do sufficiently in advance of the entry of the final order so as to give them adequate time to formulate and to present objections to the Commission's proposal. *Morgan*, therefore, does not aid appellees.

ICC v. Louisville & Nashville R. Co., 227 U. S. 88 (1913), involved what the Court there described as a "quasi-judicial" proceeding of a quite different nature than the one we review here. The provisions of the Interstate Commerce Act, 24 Stat. 379, and of the Hepburn Act, 34 Stat. 584, in effect at the time that case was decided left to the railroad carriers the "primary right to make rates," 227 U. S., at 92, but granted to the Commission the authority to set them aside if after hearing they were shown to be unreasonable. The proceeding before the Commission in that case had been instituted by the New Orleans Board of Trade complaining that certain class and commodity rates charged by the Louisville and Nashville Railway from New Orleans to other points were unfair, unreasonable, and discriminatory. 227 U. S., at 90. The type of proceeding there, in which the Commission adjudicated a complaint by a shipper that specified rates set by a carrier were unreasonable, was sufficiently different from the nationwide incentive payments ordered to be made by all railroads in this proceeding so as to make the *Louisville & Nashville* opinion inapplicable in the case presently before us.

The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Process Clause of the Four-

teenth Amendment. In *Londoner v. Denver*, cited in oral argument by appellees, 210 U. S. 373 (1908), the Court held that due process had not been accorded a landowner who objected to the amount assessed against his land as its share of the benefit resulting from the paving of a street. Local procedure had accorded him the right to file a written complaint and objection, but not to be heard orally. This Court held that due process of law required that he "have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Id.*, at 386. But in the later case of *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441 (1915), the Court held that no hearing at all was constitutionally required prior to a decision by state tax officers in Colorado to increase the valuation of all taxable property in Denver by a substantial percentage. The Court distinguished *Londoner* by stating that there a small number of persons "were exceptionally affected, in each case upon individual grounds." 239 U. S. 445, 446.

Later decisions have continued to observe the distinction adverted to in *Bi-Metallic Investment Co.*, *supra*. In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 304-305 (1937), the Court noted the fact that the administrative proceeding there involved was designed to require the utility to refund previously collected rate charges. The Court held that in such a proceeding the agency could not, consistently with due process, act on the basis of undisclosed evidence which was never made a part of the record before the agency. The case is thus more akin to *Louisville & Nashville R. Co.*, *supra*, than it is to this case. *FCC v. WJR*, 337 U. S. 265 (1949), established that there was no across-the-board constitutional right to oral argument in any administrative proceeding regardless of its nature. While the line dividing them may not always be a bright one, these decisions represent a recognized

distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

Here the incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroads subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. Indeed, one of the objections of appellee Florida East Coast was that it and other terminating carriers should have been treated differently from the generality of the railroads. But the fact that the order may in its effects have been thought more disadvantageous by some railroads than by others does not change its generalized nature. Though the Commission obviously relied on factual inferences as a basis for its order, the source of these factual inferences was apparent to anyone who read the order of December 1969. The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.

The Commission's procedure satisfied both the provisions of § 1(14)(a) of the Interstate Commerce Act and of the Administrative Procedure Act, and were not inconsistent with prior decisions of this Court. We therefore reverse the judgment of the District Court, and remand the case so that it may consider those contentions of the parties which are not disposed of by this opinion.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 70-279

United States et al.,
Appellants,
v.
Florida East Coast Railway
Company et al.

On Appeal from the United
States District Court for
the Middle District of
Florida.

[January 22, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The present decision makes a sharp break with traditional concepts of procedural due process. The Commission order under attack is tantamount to a rate order. Charges are fixed which nonowning railroads must pay owning railroads for boxcars of the latter which are on the tracks of the former. These charges are effective only during the months of September through February, the period of greatest boxcar use. For example the charge for a boxcar that costs from \$15,000 to \$17,000 and that is five years or younger in age amounts to \$5.19 a day. Boxcars costing between \$39,000 and \$41,000 and that are five years or younger in age cost the nonowning railroad \$12.98 a day. The fees or rates charged are lesser as the age of the boxcars lengthen. 49 CFR § 1036.2. This is the imposition on carriers by administrative fiat of a new financial liability. I do not believe it is within our traditional concepts of due process to allow an administrative agency to saddle anyone with a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross examine witnesses, and to present oral argument. That is required by the Administrative Procedure Act, 5 U. S. C. § 556 (d); § 556 (a) states that § 556 applies to hearings required

by § 553. Section 553 (c) provides that § 556 applies "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." A hearing under § 1 (14)(a) of the Interstate Commerce Act fixing rates, charges, or fees is certainly adjudicatory, not legislative in the customary sense.

The question is whether the Interstate Commerce Commission procedures used in this rate case "for the submission of . . . evidence in written form" avoided prejudice to the appellees so as to comport with the requirements of § 7 of the Administrative Procedure Act.¹ The Government appeals from the District Court's order remanding this case to the Commission for further proceedings on the incentive *per diem* rates to be paid by the appellee railroads for the standard boxcars they use.

In 1966, Congress amended § 1 (14)(a) of the Interstate Commerce Act to require that the Commission investigate the use of methods of incentive compensation to alleviate any shortage of freight cars "and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." 49 U. S. C. § 1 (14)(a). While the Commission was given the discretion to exempt carriers from incentive payments "in the national interest," it was denied the power to "make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate" *Ibid.*

The Commission's initial investigation under this authority (31 Fed. Reg. 9240) was terminated without action because it "produced no reliable information re-

¹ Section 7 provides that a "sanction may not be imposed" without a full hearing, including cross-examination. § 556 (d). But § 7 makes an exception, which I submit is not relevant here. It provides: "In rule making . . . an agency may, *when a party will not be prejudiced thereby*, adopt procedures for the submission of all or part of the evidence in written form." 5 U. S. C. § 556 (d) (emphasis added).

specting the quantum of interim incentive charge necessary to meet the statutory standards." 332 I. C. C. 11, 16. A subsequent study of boxcar supply and demand conditions (32 Fed. Reg. 20987) yielded data which were compiled in an interim report containing tentative charges and which were submitted to the railroads for comment. 337 I. C. C. 183. Although the Commission was admittedly uncertain whether its proposed charges would accomplish the statutory objective, *id.*, at 191, and even though "the opportunity to present evidence and arguments" was contemplated, *id.*, at 183, congressional impatience militated against further delay in implementing § 1 (14)(a).² Consequently, the Commission rejected the requests of the appellees and other railroads for further hearings and promulgated an incentive *per diem* rate schedule for standard boxcars. 337 I. C. C. 217.

Appellees then brought this action in the District Court alleging that they were "prejudiced" within the meaning of the Administrative Procedure Act by the Commission's failure to afford them a proper hearing. *Florida East Coast Ry. v. United States*, 322 F. Supp. 725 (MD Fla., 1971). Seaboard argued that it had been damaged by what it alleged to be the Commission's sudden change in emphasis from specialty to unequipped boxcars and that it would lose some \$1.8 million as the result of the Commission's allegedly hasty and experimental action. Florida East Coast raised significant challenges to the statistical validity of the Commission's data³ and also contended that its status as a terminating

² See Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. (1969).

³ Florida East Coast argues, for example, that the Commission's finding of a boxcar shortage may be attributable to a variety of sampling or definitional errors, asserting that it is unrealistic to

railroad left it with a surfeit of standard boxcars which should exempt it from the requirement to pay incentive charges.

Appellees in other words argue that the inadequacy of the supply of standard boxcars was not sufficiently established by the Commission's procedures. Seaboard contends that specialty freight cars have supplanted standard boxcars and Florida East Coast challenges the accuracy of the Commission's findings.

In its interim report, the Commission indicated that there would be an "opportunity to present evidence and arguments." The appellees could reasonably expect that the later hearings would give them the opportunity to substantiate and elaborate the criticisms they set forth in their initial objections to the interim report. That alone would not necessarily support the claim of "prejudice." But I believe that "prejudice" was shown when it was claimed that the very basis on which the Commission rested its finding was vulnerable because it lacked statistical validity or other reasoned basis. At least in that narrow group of cases, prejudice for lack of a proper hearing has been shown.

Both *Long Island R. Co. v. United States*, 318 F. Supp. 490 (EDNY 1970), and the present case involve challenges to the Commission's procedures establishing incentive *per diem* rates. In *Long Island*, however, the railroad pointed to no specific challenges to the Commission's findings (318 F. Supp., at 499) and the trial was conducted on stipulated issues involving the right to an oral hearing. *Id.*, at 491 n. 2. Since *Long Island* presented no information which might have caused the

define boxcar deficiencies in such a manner as "to show as a 'deficiency' the failure to supply a car on the day requested by the shipper no matter when the request was received." The Government's contention that a 24-hour standard was not used seems unresponsive to this argument. See 337 I. C. C., at 221.

Commission to reach a different result,⁴ there was no showing of prejudice and *a fortiori* no right to an oral hearing. In the present case, by contrast, there are specific factual disputes and the issue is the narrow one of whether written submission of evidence without oral argument was prejudicial.

The more exacting hearing provisions of §§ 7 and 8 of the Administrative Procedure Act, 5 U. S. C. §§ 556-557, are only applicable, of course, if the "rules are required by statute to be made on the record after opportunity for agency hearing." *Id.*, § 553 (c).

United States v. Allegheny-Ludlum Steel Corp., 406 U. S. 742, was concerned strictly with a rule making proceeding of the Commission for the promulgation of "car service rules" that in general required freight cars, after being unloaded, to be returned "in the direction of the lines of the road owning the cars." *Id.*, at 743, n. 1. We sustained the Commission's power with respect to these two rules on the narrow grounds that they were wholly legislative. We held that § 1 (14)(a) of the Interstate Commerce Act, requiring by its terms a "hear-

⁴ In the *Long Island* case the court, speaking through Judge Friendly, said:

"Whether there was to be an oral hearing or not, the Long Island's first job was to examine the basic data and find this out. Nothing stood in its way. . . . If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case. Instead the Long Island's request for an oral hearing was silent as to any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal. The last sentence of § 556 (d) would be deprived of all meaning if this were held sufficient to put the agency on notice that 'prejudice' would result from the denial of an oral hearing. Even taking into account the further representations that have been made to us, we fail to see that prejudice has been established." 318 F. Supp., at 499.

ing," "does not require such rules 'be made on the record'" within the meaning of § 553 (c). 406 U. S., at 757. We recognized, however, that the precise words "on the record" are not talismanic, but that the crucial question is whether the proceedings under review are "an exercise of legislative rulemaking" or "adjudicatory hearings." *Ibid.* The "hearing" requirement of § 1 (14)(a) cannot be given a fixed and immutable meaning to be applied in each and every case without regard to the nature of the proceedings.

The rules in question here established "incentive" *per diem* charges to spur the prompt return of existing cars and to make the acquisition of new cars financially attractive to the railroads.* Unlike those we considered in *Allegheny-Ludlum*, these rules involve the creation of a new financial liability. Although quasi-legislative, they are also adjudicatory in the sense that they determine the measure of the financial responsibility of one road for its use of the rolling stock of another road. The Commission's power to promulgate these rules pursuant

* 49 CFR § 1036.1 provides:

"*Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads or the United States class I railroad which is designated by the owning railroads of Canada the addition charges set forth in § 1036.2 on all boxcars shown below, . . . while in the possession of nonowning railroads and subject to *per diem* rules. These charges are in addition to all other *per diem* charges currently in effect or prescribed. Mexican owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce."

As I have noted, § 1036.2 contains a schedule of *per diem* rates or fees for the use of another's boxcars which have been shunted onto its tracks, the rates or fees being definite or precise and controlled by two variables: the cost of the boxcar and the age of the boxcar. These rates or fees, according to the record, amount to millions of dollars a year.

to § 1 (14)(a) is conditioned on the preliminary *finding* that the supply of freight cars to which the rules apply is inadequate. Moreover, in fixing incentive compensation once this threshold finding has been made, the Commission "shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply"

*The Commission discusses the critical factual issues to be resolved in fixing incentive compensation rates under § 1 (14)(a) in *Incentive Per Diem Charges*, 332 I. C. C. 11, 14-15:

"Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. We have observed that the adequacy of the national freight car fleet depends upon the interplay of a number of factors, none of which can be said to be of superior importance. Further, since the effect of an incentive charge must be produced over a future period, consideration must be given to possible changes in these factors. In recent years many innovations and improvements have taken place in car design and operation. In the transportation of many commodities the standard boxcar has been replaced by cars capable of transporting greater loads with substantially less damage. In the transportation of grains, railroads are converting more and more to the use of large covered hopper cars. Shippers of lumber and plywood have found modern cars designed to facilitate transportation of their products increasingly desirable. At the same time, many of these cars are adaptable to the transportation of other commodities when not needed in the particular trade for which they were designed. In large part, the special service boxcars, covered hoppers and flatcars of various types handle traffic which formerly moved in general service boxcars. The same is true to some extent with respect to refrigerator cars. Their larger size and, with respect to the flatcars in trailer-on-flatcar (TOFC) service, their more rapid turnaround, enables them to provide service which would require many more of the general service boxcars which they replaced.

"Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim

The majority finds *ICC v. Louisville & Nashville R. Co.*, 227 U. S. 88, "sufficiently different" so as to make the opinion in that case inapplicable to the case now before us. I would read the case differently, finding a clear mandate that where, as here, ratemaking must be based on evidential facts, § 1 (14)(a) requires that full hearing which due process normally entails. There we considered Commission procedures for setting aside as unreasonable, after a hearing, carrier-made rates. The Government maintained that the Commission, imbued with legislative ratemaking power, but required by the Commerce Act to obtain necessary information, could act on such information as the Congress might. The Government urged that we presume that the Commission's findings were supported by such information, "even though not formally proved at a hearing." *Id.*, at 93. We rejected the contention, holding that the right to a hearing included "an opportunity to test, explain or refute. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or

or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor."

rebuttal." *Ibid.* I would agree with the District Court in *Long Island R. Co.*, *supra*, at 497, that Congress was fully cognizant of our decision in *Louisville and Nashville R. Co.* when it first adopted the hearing requirement of § 1 (14)(a) in 1917. And when Congress debated the 1966 amendment which empowered the Commission to adopt incentive per diem rates, it had not lost sight of the importance of hearings. Questioned about the effect that incentive compensation might have on terminating lines, Mr. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce and floor manager of the bill, responded: "I might say to the gentleman that this will not be put into practice until there have been *full hearings* before the Commission and all sides have had an opportunity to argue and present their facts on the question." 112 Cong. Rec. 9953 (emphasis added). Nor should we overlook the Commission's own interpretation of the hearing requirement in § 1 (14)(a) as it applies to this case. The Commission's order initiating the rulemaking proceeding notified the parties that it was acting "under authority of Part I of the Interstate Commerce Act (49 U. S. C. § 1, et seq.); more particularly, section 1 (14)(a) and the Administrative Procedure Act (5 U. S. C. §§ 553, 556, and 557)." Clearly, the Commission believed that it was required to hold a hearing on the record.⁷ This interpretation, not of the Administrative Procedure Act, but of § 1 (14)(a) of the Commission's own Act, is "entitled to great weight." *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 549; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315.

⁷ In its final report, the Commission apparently still believed that its proceedings had to comply with the provisions of § 7 of the Administrative Procedure Act. The report stated that the parties had been granted a hearing in accordance with those provisions. 337 I. C.(C.), at —.

The majority at one point distinguishes *Morgan v. United States (Morgan II)*, 304 U. S. 1, on the ground that the proceedings there involved were "quasi-judicial" "and thus presumably distinct from a rulemaking proceeding such as that engaged in by the Commission here." It is this easy categorization and pigeon-holing that leads the majority to find *Allegheny-Ludlum* of controlling significance in this case. *Morgan* dealt with the "full hearing" requirement of § 310 of the Packers and Stockyards Act, 42 Stat. 159, 166, as it related to rate-making for the purchase and sale of livestock.* It is true that the Court characterized the proceedings as "quasi-judicial." But, the first time the case was before the Court, *Morgan v. United States*, 298 U. S. 468, Chief Justice Hughes noted that the "distinctive character" of the proceeding was legislative: "It is a proceeding looking to legislative action in the fixing of rates of market agencies." *Id.*, at 479. Nevertheless, the Secretary of Agriculture was required to establish rates in accordance with the standards and under the limitations prescribed by Congress. The Court concluded: "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence, it is frequently described as a proceeding of quasi-judicial character. The requirement of a

* *Morgan II* considered in some depth the parameters of a "full hearing." The majority takes the position that the case is inapposite because the hearings provided in this case do not "suffer from the defect found to be fatal in *Morgan*"—i. e., the parties were "fairly advised" of the scope and substance of the Commission proceedings. In *Morgan II*, however, there was no question that a "full hearing" included the right to present oral testimony and argument. 304 U. S., at 18-20.

"full hearing" has obvious reference to the tradition of judicial proceedings" *Id.*, at 480.

Section 1 (14)(a) of the Interstate Commerce Act bestows upon the Commission broad discretionary power to determine incentive rates. These rates may have devastating effects on a particular line. According to the brief of one of the appellees, the amount of incentive compensation paid by debtor lines amounts to millions of dollars each six-month period. Nevertheless, the courts must defer to the Commission as long as its findings are supported by substantial evidence and it has not abused its discretion. "All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity." *Ohio Bell Telephone Co. v. Public Utils. Comm'n of Ohio*, 301 U. S. 292, 304.

Accordingly, I would hold that appellees were not afforded the hearing guaranteed by § 1 (14)(a) of the Interstate Commerce Act and 5 U. S. C. §§ 553, 556, and 557 and affirm the decision of the District Court.